No. 15-415

Title:	Encino Motorcars, LLC, Petitioner v. Hector Navarro, et al.
Docketed:	October 5, 2015
Linked with 15A210	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-55323)
Decision Date:	March 24, 2015
Rehearing Denied:	June 1, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Aug 19 2015	Application (15A210) to extend the time to file a petition for a writ of certiorari from August 30, 2015 to September 30, 2015, submitted to Justice Kennedy.
Aug 20 2015	Application (15A210) granted by Justice Kennedy extending the time to file until September 30, 2015.
Sep 30 2015	Petition for a writ of certiorari filed. (Response due November 4, 2015)
Oct 5 2015	Order extending time to file response to petition to and including December 4, 2015.
Nov 4 2015	Brief amici curiae of National Automobile Dealers Association, et al. filed.
Dec 4 2015	Brief of respondents Hector Navarro, et al. in opposition filed.
Dec 22 2015	DISTRIBUTED for Conference of January 8, 2016.
Dec 22 2015	Reply of petitioner Encino Motorcars, LLC filed. (Distributed)
Jan 11 2016	DISTRIBUTED for Conference of January 15, 2016.
Jan 15 2016	Petition GRANTED.
Jan 29 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents
Feb 1 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Feb 29 2016	Joint appendix filed.
Feb 29 2016	Brief of petitioner Encino Motorcars, LLC filed.
Mar 4 2016	SET FOR ARGUMENT ON Wednesday April 20, 2016
Mar 7 2016	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Mar 7 2016	Brief amici curiae of National Automobile Dealers Association, et al. filed.
Mar 14 2016	Record requested from the U.S.C.A. 9th Circuit.
Mar 15 2016	CIRCULATED.
Mar 30 2016	Brief of respondents Hector Navarro, et al. filed. (Distributed)
Apr 5 2016	Brief amicus curiae of International Association of Machinists and Aerospace Workers, AFL-CIO filed. (Distributed)
Apr 6 2016	Brief amicus curiae of the United States filed. (Distributed)

Apr 6 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 6 2016	Brief amici curiae of Law Professors filed. (Distributed)
Apr 6 2016	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)
Apr 8 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 13 2016	Reply of petitioner Encino Motorcars, LLC filed. (Distributed)
Apr 14 2016	Letter, dated 14 April 2016, received from counsel for respondents filed. (Distributed).
Apr 20 2016	Argued. For petitioner: Paul D. Clement, Washington, D. C. For respondents: Stephanos Bibas, Philadelphia, Pa.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).
Jun 20 2016	Judgment VACATED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Ginsburg, J., filed a concurring opinion, in which Sotomayor, J., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined.
Jul 22 2016	JUDGMENT ISSUED

15-415

No. _____

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
213-330-4450

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

September 30, 2015

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
925-297-6415

Counsel for Petitioner

QUESTION PRESENTED

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week.

The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims, concluding that a service advisor is a "salesman ... engaged in ... servicing automobiles" and is thus exempt from the FLSA's overtime requirements. The Ninth Circuit reversed, deferring to a Department of Labor interpretive regulation stating that service advisors are not exempt under §213(b)(10)(A) because they do not *personally* service automobiles. The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," all of which hold that service advisors are exempt employees. Pet.App.11.

The question presented is whether "service advisors" at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

PARTIES TO THE PROCEEDING

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the Ninth Circuit. Respondents Hector Navarro, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Encino Motorcars, LLC is a limited liability corporation doing business as Mercedes Benz of Encino. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. They are an integral part of the servicing process and are the salesmen dedicated to the servicing business at their dealership. And, like countless other salesmen, Respondents are paid by commissions on their sales rather than on an hourly basis.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). For more than 40 years, federal and state courts across the country have uniformly held that service advisors such as Respondents are covered by the exemption because they are "salesm[e]n ... engaged in ... servicing automobiles." *See, e.g., Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). Those courts have also uniformly refused to defer to a Department of Labor (DOL) interpretive regulation that adopts a narrow and counter-textual interpretation of the exemption under which service advisors are not exempt because they do not *personally* service vehicles.

Respondents brought suit against their employer under the FLSA, alleging that they were entitled to time-and-a-half overtime pay for time worked each week in excess of 40 hours. Relying on an unbroken line of precedent holding that service advisors were

exempt under §213(b)(10)(A), the district court dismissed the complaint. Pet.App.25-29. But the Ninth Circuit reversed, holding that service advisors were not exempt. Unlike every other court to consider the issue, the Ninth Circuit held that DOL's narrow interpretation of §213(b)(10)(A) was entitled to deference. Pet.App.11-19. The court also relied heavily on a purported canon of construction under which exemptions to the FLSA must be interpreted "narrowly" rather than being interpreted in accordance with their plain text. Pet.App.6. The Ninth Circuit expressly acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11.

Certiorari is plainly warranted to resolve this acknowledged split of authority over the meaning of a federal statute. Indeed, the Ninth Circuit's decision not only opens up an explicit circuit split, but its interpretation badly misconstrues the text of §213(b)(10)(A). Congress' use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" makes clear that a salesman is exempt if he is "engaged in" *either* of those activities. Yet the Ninth Circuit divided a dealership's salesforce in half, treating only those selling automobiles, and not those selling services, as exempt. The court also ignored the fact that service advisors are an integral part of the servicing process because they are the salesforce that identifies the service needs of, and sells services to, the dealership's customers.

The Ninth Circuit's insistence that an employee must be personally involved in servicing automobiles

not only adds a word to the statute, but also injects a glaring textual anomaly over the status of "partsmen," who the statute treats as exempt even though they are not personally involved in either selling or servicing automobiles. Every other court to consider this issue has correctly recognized that the phrase "primarily engaged in ... servicing automobiles" encompasses service advisors and partsmen who are engaged in the servicing *process* even though they do not personally service vehicles.

The Ninth Circuit's decision injects uncertainty into what had been a settled area of the law, and will have serious consequences for the nation's 18,000 car dealerships, which currently employ more than 45,000 service advisors. Those dealerships and their service advisors have negotiated mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt from the FLSA's overtime requirements. If allowed to stand, the Ninth Circuit's decision would require a wholesale (and wholly unwarranted) restructuring of the way in which those employees are compensated, and would force dealerships to divide their salesforces into exempt and non-exempt categories in ways that are both divisive and contrary to Congress' plain intent.

This Court has repeatedly rejected plaintiffs' attempts to impose significant FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g., Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2014) (rejecting novel FLSA claims for time spent in security screenings); *Christopher v.*

SmithKline Beecham, 132 S. Ct. 2156 (2012) (rejecting FLSA claims by pharmaceutical sales representatives, who had long been treated as exempt); *see also Yi v. Sterling Collision Centers*, 480 F.3d 505, 510 (7th Cir. 2007) (rejecting novel FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing"). The decision below should fare no better. This Court should grant certiorari to correct the Ninth Circuit's deeply flawed interpretation of §213(b)(10)(A) and restore uniformity to this important area of the law.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 780 F.3d 1267 and reproduced at Pet.App.1-19. The district court's opinion is unpublished and is reproduced at Pet.App.22-32.

JURISDICTION

The Ninth Circuit issued its opinion on March 24, 2015, and denied a timely petition for rehearing on June 1, 2015. On August 20, 2015, Justice Kennedy extended the time for filing this petition to September 30, 2015. *See* No. 15A210. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §213, and DOL's regulations, 29 C.F.R. §779.372, are reproduced at Pet.App.33-61.

STATEMENT OF THE CASE

A. The "Salesman, Partsman, or Mechanic" Exemption and DOL's Shifting Interpretations

1. The FLSA generally requires employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of forty in a week. 29 U.S.C. §207(a)(1). Accompanying these overtime-pay requirements are numerous exemptions for certain types of employees. *See id.* §213(a), (b). The exemptions range from very broad (all employees of certain rail carriers and air carriers, *id.* §213(b)(2), (3)) to very narrow (employees "engaged in the processing of maple sap into sugar," *id.* §213(b)(15)).

As relevant here, the FLSA provides that the overtime-pay requirements do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A); *see* Pub. L. No. 89-601, 80 Stat. 830 (1966). In other words, an employee of a car dealership is exempt from the overtime rules if he: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

2. In 1970, the Secretary of Labor promulgated interpretive regulations that sought to define several terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971); 35 Fed. Reg. 5856, 5895-96 (1970). Those regulations defined "salesman" as "an employee who

is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]." 29 C.F.R. §779.372(c)(1) (1971).[1] DOL further asserted that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic ... are not exempt under [§213(b)(10)]." *Id.* §779.372(c)(4). DOL believed that service advisors should be deemed non-exempt even though "such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." *Id.*

In the years after DOL promulgated this interpretive regulation, several courts rejected the agency's narrow interpretation of the exemption. Most significantly. the Fifth Circuit flatly rejected DOL's position and held that service advisors were exempt. *See Deel Motors*, 475 F.2d at 1097-98. In *Deel Motors*, DOL advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not *personally* service vehicles. But the Fifth Circuit rejected that view based on both the text and

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[1] The regulation defined a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2) (1971). It also defined a "mechanic" as "any employee primarily engaged in doing mechanical work ... in the servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such." *Id.* §779.372(c)(3).

purpose of the exemption. As a textual matter, the court concluded that service advisors were plainly "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And, turning to the purpose of the exemption, the Fifth Circuit noted that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097 All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salesmen who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus concluded that service advisors were exempt under §213(b)(10)(A).

3. Within a few years of the Fifth Circuit's decision in ***Deel Motors***, DOL backtracked from the position advanced in its interpretive regulations. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be treated as exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403 (July 28, 1978) ("DOL 1978 Opinion Letter") (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).

Similarly, DOL's 1987 Field Operations Handbook instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." Dep't of Labor, Wage & Hour Div., Field Operations

Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj. The Handbook explained that "two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits)" have construed the exemption to cover service advisors. *Id.*[2] The Handbook acknowledged that "this policy ... represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

Despite these clear (and clearly correct) changes in DOL's enforcement policy, the 1970 interpretive regulations with the now-repudiated interpretation of §213(b)(10)(A) remained in the Code of Federal Regulations. In 2008, DOL initiated a formal rulemaking process to update the text of the regulations to confirm that service advisors were exempt from the overtime-pay requirements. *See Updating Regulations Issued Under the FLSA*, 73 Fed. Reg. 43,654 (2008). As DOL explained, "[u]niform appellate and district court decisions ... hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *Brennan*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a

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[2] In addition to the Fifth Circuit's decision in *Deel Motors*, the Sixth Circuit had summarily affirmed a district court decision finding service advisors to be exempt under §213(b)(10)(A). *See Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table).

modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

In 2011, however, DOL changed course yet again. It issued a final rule that neither adopted the proposed regulation nor brought the regulation in line with the governing case law. *See Updating Regulations Issued Under the FLSA*, 76 Fed. Reg. 18,832, 18,859 (2011). Instead, DOL maintained the 1970 regulation's definition of "salesman," *see* 29 C.F.R. §779.372(c)(1), but also eliminated from its regulations any explicit discussion of whether service advisors were covered under the §213(b)(10)(A) exemption, *see* 76 Fed. Reg. at 18,859. In its explanation accompanying the final rule, DOL stated that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838. That remains DOL's position today: DOL believes that service advisors are not exempt under §213(b)(10)(A) because they do not *personally* service vehicles.

B. Respondents' Complaint and the District Court's Decision

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Respondents are current and former employees of Petitioner who worked at the dealership as "service advisors." On September 18, 2012, Respondents filed a complaint alleging several violations of the FLSA and California Labor Code.

The complaint alleges that, as service advisors, Respondents would meet and greet car owners as they entered the service area; evaluate customers' service

and repair needs; suggest services to be performed on the vehicle to address the customers' complaints; solicit supplemental services to be performed (such as preventive maintenance); prepare price estimates for repairs and services; and inform the owner about the status of the vehicle. *See* Complaint ¶16 (DN 2). In short, Respondents' sales activities were integral to the process of servicing vehicles at the dealership. And, like countless other salesmen in both car dealerships and other industries, Respondents were paid by commission. *Id.* ¶¶18-19.[3] The more services an advisor sold, the higher his or her commission would be. *Id.*

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them time-and-a-half overtime compensation for that excess time. *Id.* ¶¶24-31. Petitioner moved to dismiss the FLSA claims on the ground that Respondents were exempt employees under 29 U.S.C. §213(b)(10)(A).

On January 25, 2013, the district court granted Petitioner's motion to dismiss the FLSA claims, holding that Respondents were clearly covered by the overtime-pay exemption in §213(b)(10)(A). *See* Pet.App.25-29. The district court began by noting that several other courts "have applied this exemption to Service Advisors." Pet.App.26 (citing *Deel Motors*, 475 F.2d at 1097; *Walton*, 370 F.3d at 453).

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[3] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships (like Petitioner) pay service advisors solely by commission.

The district court acknowledged that DOL had stated in 1970 and apparently again in 2011 that §213(b)(10)(A) did not apply to service advisors. Pet.App.27 The court nonetheless refused to defer to those interpretations under the *Chevron* framework because they were unreasonable. Pet.App.28-29. The court agreed with the Fourth and Fifth Circuits that DOL's interpretations were an "impermissibly restrictive construction of the statute." Pet.App.29 (quoting *Walton*, 370 F.3d at 452). Because "Service Advisors ... are *functionally equivalent* to salesmen and mechanics and are similarly responsible for the 'selling and servicing' of automobiles," the district court concluded that it would be "unreasonable" to carve those employees out of the exemption. *Id.* (emphasis added). The court did not believe that "Congress intended to treat employees with functionally similar positions differently." *Id.* (quoting *Deel Motors*, 475 F.2d at 1097-98). The district court thus dismissed Respondents' claim for overtime under the FLSA on the ground that they were exempt under §213(b)(10)(A).[4]

C. The Ninth Circuit's Decision

On appeal, the Ninth Circuit reversed in relevant part. In an opinion by Judge Graber issued on March 24, 2015, the court held that service advisors who work at a car dealership are not exempt under §213(b)(10)(A) from the FLSA's overtime-pay requirements. Pet.App.19.

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[4] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims. Pet.App.31.

The panel relied heavily on the purported canon of construction that "[t]he FLSA is to be construed liberally in favor of employees," and "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)). Because the statute does not define "salesman, partsman, or mechanic," and does not explicitly mention "service advisors," the Ninth Circuit could not "conclude that service advisors ... are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'" Pet.App.7 (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

The Ninth Circuit also disagreed with the district court's application of *Chevron*, concluding that DOL had reasonably interpreted an ambiguous FLSA exemption. The court believed that there were two "plausible" interpretations of the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pet.App.7. Under the first interpretation, a service advisor is a "salesman ... primarily engaged in ... servicing automobiles" and is thus exempt. *Id.* Under the second interpretation, which the Ninth Circuit characterized as "at least as plausible," the nouns in the statute would be interpreted in a "more cabined" way: "a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars." *Id.* Under that narrower interpretation, "[s]ervice advisors do none of those things; they sell services for cars." *Id.* The Ninth Circuit thus concluded that the exemption is ambiguous about whether it extends to service advisors. Pet.App.8.

Turning to *Chevron*'s second step, the Ninth Circuit upheld DOL's current interpretation of the exemption as reasonable. Pet.App.11-19. The court's reasoning rested primarily on the same ambiguity that it had identified earlier. In particular, the Ninth Circuit concluded that it was reasonable for DOL to read the exemption so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if they are "engaged in ... servicing automobiles." Pet.App.13-15.

The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11 (citing *Walton*, 370 F.3d 446; *Deel Motors*, 475 F.2d 1095; *Thompson*, 294 P.3d 397). But the court "respectfully disagree[d] with those decisions." *Id.*

The panel rejected the other courts' conclusion that DOL's 1970 interpretation of §213(b)(10)(A) was "unduly restrictive." Pet.App.12-13. Those courts had held that DOL's interpretation was unreasonable because it unjustifiably restricted the scope of the statutory text. In particular, DOL's interpretation disregarded the fact that a service advisor could be a "salesman ... primarily engaged in ... servicing automobiles." *See Walton*, 370 F.3d at 452; *Thompson*, 294 P.3d at 402.

The Ninth Circuit, however, concluded that DOL's regulation honored the disjunctive nature of the phrase "salesman ... primarily engaged in selling or servicing automobiles." First, the court concluded that there was ambiguity as to whether the phrase "primarily engaged in selling or servicing" refers to the

act of *personally* selling or servicing automobiles or instead to "the general business" of selling or servicing automobiles. Pet.App.12-14. Second, the court identified as a potential ambiguity whether the word "salesman" was modified only by the gerund "selling" or was instead modified disjunctively by either gerund, "selling" and "servicing." Pet.App.13-15. The court further noted that "[n]on-textual indicators of congressional intent, such as legislative history, are inconclusive." Pet.App.15.

The Ninth Circuit ultimately concluded that "there are good arguments supporting both interpretations of the exemption," but that "where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice." Pet.App.19. The court thus held that Respondents were not exempt under 29 U.S.C. §213(b)(10)(A) and reversed the district court's dismissal of Respondents' claims.[5] The Ninth Circuit denied a timely petition for rehearing on June 1, 2015.

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle for this Court to resolve an acknowledged split of authority over whether tens of thousands of "service advisors" who work at car and truck dealerships are exempt from the FLSA's overtime-pay requirements.

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[5] The Ninth Circuit affirmed the district court's dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. *See* Pet.App.3-4 n.2. And because it reinstated Respondents' federal overtime-pay claim, the Ninth Circuit vacated the district court's dismissal of Respondents' state-law claims for lack of jurisdiction. *See id.*

I.A. In a clear departure from a previously unbroken line of authority. the Ninth Circuit held that service advisors are not exempt from the FLSA's overtime-pay requirements. The court readily acknowledged that its decision "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11. Certiorari is warranted because the decision below is plainly in conflict with both "the decision of another United States court of appeals on the same important matter" and "a decision by a state court of last resort." S. Ct. R. 10(a).

I.B. It is unsurprising that the Ninth Circuit's decision is an outlier, as that court badly misconstrued the §213(b)(10)(A) exemption. That exemption unambiguously extends to "any salesman ... primarily engaged in ... servicing automobiles. 29 U.S.C. §213(b)(10)(A). The plain text of this exemption applies to service advisors, who are integral to the process of servicing vehicles at the dealership and are clearly "salesm[e]n ... primarily engaged in ... servicing automobiles." Yet the Ninth Circuit gave dispositive weight to DOL's narrow and counter-textual interpretation of the exemption, which reads out of the statute the phrase "any salesman ... primarily engaged in ... *servicing automobiles*" and reads into the statute a restrictive modifier demanding that an exempt employee be *personally* involved in servicing.

DOL's interpretation flies in the face of the most basic rules of statutory construction and grammar. As to statutory construction, there is no cause for reading into the statute a word that Congress did not include,

especially when doing so creates interpretive problems for other statutory terms (*e.g.*, partsmen are plainly exempt even though they do not personally sell or service automobiles) and practical problems for employers (*e.g.*, dealerships must divide their salesforces between exempt and non-exempt employees in ways Congress did not intend). As for grammar, the term "or" in the phrase "salesman ... primarily engaged in ... selling or servicing" is disjunctive, and either gerund—"selling" or "servicing"—can sensibly be applied to the noun "salesman." Because a service advisor is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles," that should be the end of the inquiry under *Chevron*. A service advisor is clearly covered by the plain language of the exemption, as every court to consider this issue (other than the Ninth Circuit) has correctly recognized.

Moreover, treating service advisors as non-exempt makes little sense in the context of the broader FLSA scheme. The FLSA contains many provisions that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid by commission. *See, e.g.*, 29 U.S.C. §§207(*i*), 213(a)(1). Such exemptions reflect the basic reality that salesmen, including service advisors, "are more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097. Forcing car dealerships to pay overtime to service advisors is little more than an attempt to fit a square peg (salesmen) into a round hole (FLSA-mandated hourly compensation). *See Christopher*, 132 S. Ct. at 2173 (rejecting FLSA claim by sales representatives who were "hardly the kind of employees that the FLSA

was intended to protect"). Worse still, retroactively treating service advisors as non-exempt under §213(b)(10)(A) would result in perverse and disruptive outcomes for both dealerships and service advisors alike, as it would force them into pay plans very different from the plans they had voluntarily negotiated.

Finally, the Ninth Circuit's heavy reliance on the purported canon of construction that "the FLSA is to be construed liberally in favor of employees" and that "exemptions are narrowly construed against employers," Pet.App.6, is profoundly misplaced. This "anti-employer" canon—which is just an FLSA-specific version of the broad-construction-of-remedial-statutes canon that this Court has characterized as "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995)—is a recipe for extravagant interpretations of the FLSA. In addition to resolving the circuit split over the proper interpretation of §213(b)(10)(A), this Court could usefully instruct lower courts that the FLSA and its exemptions are to be construed neither narrowly nor broadly, but fairly and correctly.

II. The Ninth Circuit's erroneous interpretation of §213(b)(10)(A) will have far-reaching implications for the nation's 18,000 franchised car dealerships, which employ an estimated 45,000 service advisors. Dealerships and service advisors voluntarily negotiated mutually beneficial compensation plans in good-faith reliance on the unbroken line of authority finding such employees to be exempt. Yet the Ninth Circuit's decision would require a wholesale reworking of that position, to the detriment of dealerships and

service advisors alike. This Court has been justifiably skeptical of attempts by plaintiffs to impose significant retroactive liability for settled industry practices that had long been viewed as outside the scope of the FLSA. *See, e.g.*, *Christopher*, 132 S. Ct. at 2167-68. It may be possible for unlawful employment practices to escape detection for decades on end, but the far more plausible view is that the employers have been left alone because their practices simply do not violate the FLSA.

Moreover, the lack of uniformity is especially troubling in the FLSA context because of the availability of nationwide FLSA collective actions. Because plaintiffs may file collective action claims in the most plaintiff-friendly forum, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for any dealership that has operations within the Ninth Circuit. Certiorari is plainly warranted to restore national uniformity to this important area of the law.

I. The Ninth Circuit's Decision Openly Conflicts With The Decisions Of Several Other Courts And Is Wrong On The Merits.

A. The Ninth Circuit's Decision Squarely Conflicts With Decisions of the Fourth and Fifth Circuits and the Montana Supreme Court.

In a stark departure from a previously unbroken line of authority, the Ninth Circuit held that service advisors are not exempt from the FLSA's overtime-pay requirements. The court readily acknowledged that its decision "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the

Supreme Court of Montana," and noted that it "respectfully disagree[s]" with the reasoning of those cases. Pet.App.11-12. There is thus no serious question that the lower courts are divided over the meaning of §213(b)(10)(A).

1. In *Walton v. Greenbrier Ford*, 370 F.3d 446, the Fourth Circuit held that service advisors fall within the plain text of the FLSA's overtime-pay exemption. The *Walton* plaintiff's job duties were identical to Respondents' job duties here: he would "greet customers, listen to their concerns about their cars, write repair orders, follow-up on repairs, [] keep customers informed about maintenance, [and] suggest to customers additional services that needed to be performed." *Id.* at 449.

Under the plain text of §213(b)(10)(A), the Fourth Circuit concluded that service advisors were "salesm[e]n ... primarily engaged in servicing automobiles." *Id.* at 453. Service advisors are an "integral part of the dealership's servicing of automobiles" because they are the "first line ... service sales representative[s]." *Id.* at 452-53. Their role was to figure out what services the customer needed, prepare cost estimates, and sell both necessary repair services and supplemental services. *Id.* The court thus concluded that those employees were salesmen "primarily engaged in servicing automobiles." *Id.*

The Fourth Circuit also held that DOL's interpretation of the exemption in its 1970 interpretive regulation was "unreasonable" because it is "an impermissibly restrictive construction of the statute." *Id.* at 452. Under DOL's view, a salesman would be covered by the exemption only if he were

primarily engaged in *selling vehicles*. But, as the Fourth Circuit explained, that interpretation effectively ignores the second half of the disjunctive clause "selling *or servicing* automobiles." 29 U.S.C. §213(b)(10)(A) (emphasis added). The court refused to defer to DOL's "restrictive regulatory definition" because it "unreasonably implements the congressional mandate." 370 F.3d at 452.

Similarly, in *Deel Motors*, 475 F.2d 1095, the Fifth Circuit flatly rejected DOL's position and held that service advisors were exempt from the FLSA. Under the plain text of the exemption, the court concluded that service advisors were "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And the court further noted that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097. All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salesmen who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus had little difficulty concluding that service advisors were exempt under §213(b)(10)(A), notwithstanding DOL's arguments to the contrary.

Several other courts have reached the same conclusion. In *Thompson*, 294 P.3d 397, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that the §213(b)(10)(A) exemption covers service advisors at car dealerships. *Id.* at 402. The court found no ambiguity in the relevant statutory

text because "[a] plain, grammatical reading of 29 U.S.C. §213(b)(10)(A) makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles." *Id.* The court added that "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic,' who [is] primarily engaged in either of these duties." *Id.*

The federal district courts that have addressed this issue have also uniformly concluded that the exemption in §213(b)(10)(A) applies to service advisors at car dealerships. *See, e.g., Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975). The district court here likewise held that service advisors were exempt. *See* Pet.App.29. Thus, describing this case as presenting an acknowledged circuit split substantially understates matters. The Ninth Circuit expressly parted company with *every* other court to consider the question.

2. The Ninth Circuit readily acknowledged that its decision "conflicts with" the decisions cited above, *Id.* at 11. It had no choice. Respondents perform the exact same job functions as the service advisors in the cases cited above, yet the Ninth Circuit found them to be non-exempt while every other court has found them to be exempt. Moreover, each of the decisions cited above rejected DOL's interpretation of the exemption

on the ground that it was an unreasonable interpretation of the statute, whereas the Ninth Circuit gave DOL's position controlling weight. *Id.* at 19 ("we must defer to [DOL's] choice"). It is difficult to imagine a clearer example of "a decision in conflict with the decision of another United States court of appeals on the same important matter," and a decision that "conflicts with a decision by a state court of last resort." S. Ct. R. 10(a).

A circuit split over the meaning of a federal statute would be undesirable under any circumstances, but the need for a uniform rule in this context is particularly critical. The FLSA provides for nationwide collective actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). Because of the availability of nationwide FLSA collective actions, the most plaintiff-friendly jurisdiction will often be able to establish the *de facto* substantive law that governs many employers throughout the entire country

Indeed, as the National Automobile Dealers Association noted in an *amicus* brief below, there are hundreds of car dealerships that operate at locations both within and outside the Ninth Circuit. As a result, even though the Ninth Circuit is the only court to have ever found service advisors to be non-exempt, that jurisdiction will likely become a forum of choice for plaintiffs seeking to challenge the exempt status of service advisors. One way or the other, the scope of a critical federal labor statute should not turn on the happenstance of the state in which a company is

operating. Certiorari is plainly warranted to restore a nationally uniform interpretation of §213(b)(10)(A).

B. The Ninth Circuit Badly Misconstrued Section 213(b)(10)(A).

It is not surprising that the Ninth Circuit is the only court to have found service advisors to be non-exempt, as the decision below is unmoored from both the text and purpose of §213(b)(10)(A).

The FLSA exempts from the overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." *Id.* The only question is whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* They plainly are, and the Ninth Circuit's reasons for holding otherwise do not withstand scrutiny.

1. Service advisors are salesmen primarily engaged in servicing automobiles.

If a statute is neither "silent [nor] ambiguous with respect to the specific issue," the statute's clear meaning controls. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). The FLSA exemption at issue here unambiguously extends to "any salesman ... primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A).

That should be the end of the matter, as a service advisor is integral to the process of servicing vehicles at a dealership, and is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles." According to Respondents' own complaint, their job duties included evaluating customers' service and repair needs; suggesting services to address specific problems with the vehicles; preparing cost estimates; and offering supplemental services such as preventative maintenance. *See* Complaint ¶16 (DN 2). As the Fourth Circuit has correctly recognized, service advisors are "primarily engaged in servicing automobiles" because they are an "integral part of the dealership's servicing of automobiles" and are the "first line ... service sales representatives." *Walton*, 370 F.3d at 452-53. They are thus exempt under a straightforward textual interpretation of §213(b)(10)(A).

In holding to the contrary, the Ninth Circuit gave dispositive weight to DOL's interpretation of the exemption. According to DOL, despite the statute's disjunctive language—"any salesman, partsman, or mechanic primarily engaged in *selling or servicing* automobiles"—the exemption covers salesmen "engaged in selling" cars, but not salesmen "engaged in servicing" them. *See* 76 Fed. Reg. at 18,838 (asserting that exemption is limited to "salesmen who sell vehicles and partsmen and mechanics who service vehicles").

That interpretation flies in the face of the most basic rules of grammar. In interpreting a sentence with multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked

to each gerund as long as that noun-gerund combination has a sensible meaning. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise ...."); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) ("The words ... are written in the disjunctive, implying that each has a separate meaning."). Here, there is no question that the term "or" in the phrase "salesman ... primarily engaged in selling or servicing" is disjunctive and that both gerunds can sensibly be applied to the noun "salesman." Thus, *both* parts of the disjunctive phrase "engaged in selling or servicing automobiles" can plainly be applied to the noun "salesman."

The Ninth Circuit offered two basic reasons for finding ambiguity and deferring to DOL's interpretation, but neither withstands scrutiny. First, the Ninth Circuit offered an alternative interpretation of the statute in which the words "selling" and "servicing" refer only to the specific acts of *personally* selling or servicing cars, and not to the general process of sales or service. *See* Pet.App.12-13. Under that view, because a service advisor does not personally service vehicles, he cannot be "primarily engaged in ... servicing automobiles."

That argument impermissibly injects a word into the statute and creates a significant interpretative anomaly for one of the key words that actually appears in the statutory text. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the

words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The notion that an exempt employee must be *personally* involved in servicing automobiles requires adding a restrictive modifier that is absent in the statutory text. That is problematic enough, but the word DOL would add to the statute also creates a significant textual anomaly. Partsmen are plainly exempt employees under the statute, but they do not personally engage in either selling or servicing. Instead, those workers are "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2).

There is no satisfactory answer to the anomaly that arises if the statute is interpreted as requiring direct personal involvement in servicing. It cannot seriously be contended that the exemption covers only partsmen who personally service automobiles, for that is a null set. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statute or regulation must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). But if, as is clearly the case, partsmen come within the plain terms of the exemption because they are engaged in the *general process* of selling or servicing automobiles rather than personally engaged in selling or servicing automobiles, then service advisors must also come within the terms of the exemption. Indeed, if anything, the service advisors, who diagnose problems and recommend solutions are more personally involved in servicing than the plainly exempt partsmen. And no canon of construction permits interpreting the concept of servicing broadly for partsmen and narrowly for salesmen. *See, e.g.*,

FCC v. AT&T, 562 U.S. 397, 408 (2011) ("identical words and phrases within the same statute should normally be given the same meaning" throughout the statute).

Second, in attempting to conjure up ambiguity in the statutory text, the Ninth Circuit asserted that the exemption could be construed such that the noun "salesman" is modified only by "selling" rather than "selling" and "servicing." Pet.App.14-15; *see also* 76 Fed. Reg. at 18,838 (limiting exemption to "salesmen who sell vehicles" and "mechanics who service vehicles"). The court provided two stylized analogies that, in its view, highlighted this purported ambiguity. The Ninth Circuit first presented the sentence, "if my dogs or cats are eating or drinking, then I know not to pet them." Pet.App.14. In this sentence, it is clear from the context that both "eating" and "drinking" can apply to both "dog" and "cat." The court contrasted that sentence with the sentence, "if my dogs or cats are barking or meowing, then I know that they need to be let out." *Id.* It is equally clear from the context of this sentence that "barking" applies only to dogs and "meowing" applies only to cats. Reasoning by analogy, the Ninth Circuit concluded that the phrase "salesman, partsman, or mechanic primarily engaged in selling or servicing" could be understood as akin to either the "barking or meowing" sentence or the "eating or drinking" sentence, thereby resulting in ambiguity for DOL to fill.

There are two serious problems with those examples. First, rather than demonstrating any ambiguity here, those examples simply underscore

that context matters and can provide clear answers. Neither dog/cat example is ambiguous. The first illustrates the default grammatical rule that unless the disjunctive gerund is distinct to one of the disjunctive nouns, then the gerund modifies all the nouns to which it could apply. An effort to limit that phrase to eating dogs and drinking cats would be nonsensical. Put differently, there is no ambiguity as to whether that phrase covers drinking dogs and eating cats. They are plainly covered. The second example demonstrates that the default rule can be overcome when the gerunds are by their nature limited to a particular noun. Meowing dogs and barking cats are not covered because there are no such animals. Once again, the phrase is unambiguous. But there is nothing oxymoronic or even anomalous about a salesman primarily engaged in the servicing of automobiles. That is exactly what service advisors do, and they are unambiguously covered by the exemption.

The second problem with the Ninth Circuit's example once again stems from the exemption's undeniable coverage of partsmen. Congress' inclusion of partsmen is fatal to the Ninth Circuit's theory that Congress intended to limit the application of each of the disjunctive gerunds to only one of the listed nouns. In the "dog-cat" analogy, the partsman is the figurative "horse" (or any other animal) in the sentence that confirms that the gerunds are more similar to generic "eating or drinking" than to species-particular "barking or meowing." Indeed, the FLSA exemption in §213(b)(10)(A) contains *three* nouns but only *two* gerunds, which makes it mathematically impossible to link the nouns to the gerunds on a one-

to-one basis. Context matters, and the number and positioning of the nouns and gerunds makes clear that a salesman—like a partsman or mechanic—can be "primarily engaged in ... servicing automobiles."

2. At a minimum, DOL's interpretation is unreasonable and thus not entitled to deference.

Unlike other subsections of the FLSA, Congress did not expressly delegate to DOL authority to interpret §213(b)(10)(A). *Compare, e.g.*, 29 U.S.C. §213(a)(1) (granting DOL authority to "define[] and delimit[] from time to type by regulations" the definition of "outside salesman"), *and id.* §213(b)(14) (granting DOL authority to define the phrase "area of production"), *with id.* §213(b)(10)(A) (no comparable grant of authority). Accordingly, DOL's regulation is not a legislative regulation, but merely an interpretive one. *See Chevron*, 467 U.S. at 843-44. Interpretive regulations are accorded less deference than legislative regulations, and may be upheld by a court only if they "implement the congressional mandate in a reasonable manner." *Walton*, 370 F.3d at 452; *see also* Pet.App.29 ("mere interpretation" is "accorded lower deference").

DOL's interpretation of §213(b)(10)(A) plainly fails that test. All of the arguments for why the text of the exemption is unambiguous apply with equal, if not greater, force in explaining why DOL's interpretation is unreasonable. *See Walton*, 370 F.3d at 452 (finding DOL interpretation to be "unreasonable, as it is an impermissibly restrictive interpretation of the statute").

Moreover, DOL's flimsy justification for reversing its interpretation of §213(b)(10)(A) in 2011 only compounds the unreasonableness of its position and the inappropriateness of substantial deference. For nearly 40 years, service advisors and car dealerships have negotiated mutually beneficial compensation plans in good-faith reliance upon DOL's oft-repeated assertion that service advisors were exempt employees. *See* DOL 1978 Opinion Letter, 1978 WL 51403 (service advisors exempt from FLSA as long as their sales are primarily for non-warranty service). Yet DOL purported to change that longstanding interpretation in 2011 based on the very same counter-textual reading of §213(b)(10)(A) that a number of courts had already rejected. *See* 76 Fed. Reg. at 18,838 (limiting exemption to "salesmen who sell vehicles and partsmen and mechanics who service vehicles"). That specious justification falls far below the type of reasoned decisionmaking expected of an agency before it upends a policy that "has engendered serious reliance interests." *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (under *Chevron*, a "change that does not take account of legitimate reliance on prior interpretation[s] ... may be 'arbitrary, capricious [or] an abuse of discretion'").

In all events, DOL's position must be rejected regardless of the level of deference it receives. In addition to the significant textual flaws discussed above, treating service advisors as non-exempt makes little sense in the broader scheme of the FLSA. The FLSA contains numerous provisions (in addition to §213(b)(10)(A)) that are designed to exclude from the mandatory overtime rules individuals who are

engaged in sales or paid by commission. *See, e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman").

Those provisions reflect the basic reality that it is both common and reasonable for salesmen to be compensated based on their *success at selling*, rather than the sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*, 475 F.2d at 1097. Like countless other salesmen who are treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* Forcing an employer to pay service advisors—who are quintessential salesmen—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *Cf. Christopher*, 132 S. Ct. at 2173 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

Finally, DOL's interpretation also forces dealerships to differentiate among their employees in ways that are contrary to Congress' plain intent. Service advisors are in some sense a hybrid, since their job is to sell, but they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-

exempt, there might be a boundary question on which DOL was due some deference. But here DOL has seized on the fact that service advisors are a hybrid between two *fully exempt* categories as a ground for deeming them non-exempt. That interpretation makes no sense and needlessly creates fissures among similar employees that Congress plainly did not intend.

3. The Ninth Circuit erred by holding that FLSA exemptions should be interpreted "narrowly."

Finally, the Ninth Circuit buttressed its untenable conclusion by relying heavily on the purported canon of construction that "the FLSA is to be construed liberally in favor of employees," and that "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro*, 745 F.3d at 1256). Indeed, the Ninth Circuit effectively applied a clear statement rule, holding that employees must be treated as subject to the FLSA's overtime rules unless they "plainly and unmistakably" fall within an exemption. *Id.* (quoting *Solis*, 656 F.3d at 1083).

That purported canon of construction is just an FLSA-specific variant of the disfavored notion that courts should interpret remedial statutes broadly. *See, e.g.*, *OWCP*, 514 U.S. at 135-36 (describing broad-construction canon as "that last redoubt of losing causes"). But applying this misguided canon does nothing but guarantee extravagant results in FLSA cases. The goal of a court interpreting a statute "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of*

Contemporary Legal Analysis, 40 Case W Res. L. Rev. 581, 582 (1990). Thus, in addition to addressing the circuit split concerning the meaning of §213(b)(10)(A), granting plenary review would give this Court an opportunity to clarify that the FLSA should be construed neither narrowly nor broadly, but fairly and correctly.

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Dealerships And Will Inject Uncertainty Into A Previously Settled Area Of The Law.

The scope of the FLSA exemption under §213(b)(10)(A) is of tremendous practical significance to the automobile industry nationwide. The nation's 18,000 franchised car dealerships employ an estimated 45,000 service advisors. Based on decades of settled precedent treating those employees as exempt, service advisors and dealerships negotiated compensation packages based primarily on sales commissions rather than hourly wages. Yet the Ninth Circuit has now concluded that this entire arrangement has been unlawful all along.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 132 S. Ct. at 2168. The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability

(including back pay and double damages). *See, e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *Christopher*, 132 S. Ct. at 2170-74 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt ... transgressed the FLSA"); *see also Yi*, 480 F.3d at 510-11 (rejecting FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing").

Those concerns are at their zenith in cases like this and *Christopher* where the plaintiffs seek to have employees who were actually paid on a commission-basis retroactively reclassified as non-exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 132 S. Ct. at 2173 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). And, of course, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily negotiated, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in DOL's approach. Under the approach adopted by every other court to consider the

issue, all sales employees are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not other salespeople (or others engaged in providing service, such as partsmen or mechanics), a huge windfall. Those windfalls cannot help but prove to be divisive. Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also having to deal with anomalous divisions among their salesforces going forward.

Finally, as noted above, because the FLSA provides for nationwide collective actions, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for all dealerships that have at least some operations within the Ninth Circuit. Thus, this is not a case in which further percolation of the relevant issues would be helpful or desirable. The far better course is to grant certiorari immediately to restore uniformity to this important area of the law and reaffirm what numerous courts have held since the 1970s—that service advisors are exempt from the FLSA's overtime rules under the plain text of 29 U.S.C. §213(b)(10)(A).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
213-330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
925-297-6415

Counsel for Petitioner

September 30, 2015

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO, A CORPORATION,

Defendant-Appellee.

Argued: February 11, 2015
Filed: March 24, 2015

OPINION

Before: Susan P Graber and Kim McLane Wardlaw, Circuit Judges, and James C. Mahan,* District Judge.

GRABER, Circuit Judge:

We consider here a question of first impression for our circuit: Are "service advisors" who work at a car dealership exempt from the overtime pay

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

requirements of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219, under 29 U.S.C. § 213(b)(10)(A), which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"? Reviewing de novo, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 (9th Cir. 2014), *petition for cert. filed*, __U.S.L.W __ (U.S. Jan. 26, 2015) (No. 14-920), we answer that question "no" and, accordingly, reverse the district court's holding to the contrary.

FACTUAL AND PROCEDURAL HISTORY

Defendant Encino Motorcars, LLC, sells and services new and used Mercedes-Benz automobiles.[1] Defendant employed or employs Plaintiffs Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro as "service advisors." The complaint alleges:

> The job duties and obligations of Service Advisors ... are to meet and greet Mercedes Benz owners as they enter the service area of the dealership and then to evaluate the service and/or repair needs of the vehicle owner in light of complaints given them by these vehicle owners. Upon evaluation of the service deeds of the vehicle, the Service Advisors ... then solicit and suggest[] that certain service[s] be conducted on the vehicle to remedy the complaints of the vehicle owner

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[1] Because the district court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), we take the facts alleged in the complaint as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

> by conducting certain repairs at [Defendant's dealership] and through [Defendant's] own mechanics. The Service Advisors ... are also duty bound and obligated by [Defendant] to solicit and suggest that supplemental service be performed on the vehicle above and beyond that which is required in response to the initial complaints of the vehicle owner. The Service Advisors ... then write up an estimate for the repairs and services and provide[] that to the vehicle owner. The vehicle is then taken to the mechanics at [Defendant] for repair and maintenance.
>
> As required by [Defendant] and oftentimes while the vehicle is with [Defendant's] mechanics, the Service Advisors ... will then call the vehicle owner and solicit and suggest that additional work be performed on the vehicle at additional cost.

Defendant pays service advisors on a commission basis only; Plaintiffs receive neither an hourly wage nor a salary.

In 2012, Plaintiffs filed this action alleging, among other things, that Defendant has violated the FLSA by failing to pay overtime wages. The district court dismissed the overtime claim because, the court concluded, Plaintiffs fall within the FLSA's exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Plaintiffs timely appeal.[2]

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[2] The court dismissed Plaintiffs' other federal claims (claims 3, 5, and 7) on alternative grounds not challenged on appeal. For

DISCUSSION

Title 29 U.S.C. § 207(a)(1) requires that employers pay time-and-a-half for hours worked in excess of 40 per workweek. But § 213(b)(10)(A) provides that "[t]he provisions of section 207 of this title shall not apply with respect to ... any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Defendant, as a car dealership, is a "nonmanufacturing establishment primarily engaged in the business of selling ... vehicles ... to ultimate purchasers." *Id.* The question is whether each Plaintiff is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.*

Plaintiffs argue that we must defer to the United States Department of Labor's 2011 regulatory definitions, set out at 29 C.F.R. § 779.372(c). 76 Fed. Reg. 18,832-01 (Apr. 5, 2011). Those regulations state, in relevant part:

> Salesman, partsman, or mechanic.
>
> (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts

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that reason, we affirm the court's dismissal of those claims. The court also exercised its discretion under 28 U.S.C. § 1367(c) to dismiss Plaintiffs' state-law claims for lack of supplemental jurisdiction. Because we reverse the dismissal of the overtime claim (claim I), we also reverse the dismissal of the state-law claims.

> for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling....
>
> (2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.
>
> (3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such....

29 C.F.R. § 779.372(c). As the agency explained in 2011, the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. Because Plaintiffs do not fit within any of those definitions, they are not exempt from the FLSA's overtime wage provisions. Defendant concedes that Plaintiffs do not meet the regulatory definitions, but counters that we should not defer to the regulation.

We conduct the familiar two-step inquiry to determine whether to defer to the agency's interpretation. *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 160 (2014). "At step one, we ask 'whether Congress has directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron, U.S.A, Inc. v. Natural Res. Def.*

Council, Inc., 467 U.S. 837, 842 (1984)). If so, then the inquiry is over, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. But if the statute is silent or ambiguous, then we must determine, before step two, what level of deference applies. *McMaster*, 731 F.3d at 889. "If we determine that *Chevron* deference applies, then we move to step two, where we will defer to the agency's interpretation if it is 'based on permissible construction of the statute'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

A. At *Chevron* Step One, the Statute is Ambiguous.

When construing a congressional enactment, "our inquiry begins with the statutory text." *BedRoc Ltd. v. United States*, 541. U.S. 176, 183 (2004). In addition, in the present context we must apply the background rule that "[t]he FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir.), *cert. denied*, 135 S. Ct. 138 (2014). "FLSA exemptions ... are to be withheld except as to persons plainly and unmistakably within their terms and spirit."[3] *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011) (internal quotation marks omitted). "An employer who

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[3] The rule that courts should construe the FLSA's exemptions narrowly originated in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). In recent years, the Supreme Court has clarified that the presumption applies only to the exemptions in § 213 and not more generally. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012).

claims an exemption from the FLSA bears the burden of demonstrating that such an exemption applies." *Id.* (internal quotation marks omitted).

As noted, the statute exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The statute does not define the terms "salesman, partsman, or mechanic." Examining the statutory text and applying canons of statutory interpretation, we cannot conclude that service advisors such as Plaintiffs are "persons plainly and unmistakably within [the FLSA's] terms and spirit," *Solis*, 656 F.3d at 1083 (internal quotation marks omitted).

It is plausible to read the term "salesman" broadly and to connect the term to "servicing automobiles"; that is, one could consider a service advisor to be a "salesman ... primarily engaged in ... servicing automobiles." But, as explained in more detail below, in Part C, it is at least as plausible to read the nouns in a more cabined way: a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars. Service advisors do none of those things; they sell services for cars. They do not sell cars; they do not stock parts; and they do not perform mechanical work on cars.

It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves. Certainly Congress did not exempt all employees of a car dealership; for example, a

bookkeeper who tracks invoices for car sales and servicing is plainly not exempt, nor is a secretarial employee who routes calls to the salesmen, partsmen, and mechanics. Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 "exemptions are narrowly construed against employers." *Haro*, 745 F.3d at 1256.

In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress has not "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, the statute is ambiguous.

B. *Chevron* Provides the Appropriate Lens.

When a statute is ambiguous, then we must determine, "prior to step two," the appropriate standard: either the *Chevron* test of reasonableness or a lower standard under *United States v. Mead Corp.*, 533 U.S. 218 (2001). *McMaster*, 731 F.3d at 889. Because we consider here a regulation duly promulgated after a notice-and-comment period, *Chevron's* "reasonableness" standard applies. *See*, e.g., *Renee v. Duncan*, 623 F.3d 787, 795 (9th Cir. 2010) ("The challenged federal regulation interprets a federal statute. The regulation was adopted by the responsible federal agency through notice and comment rulemaking. We therefore apply the analytical framework outlined in *Chevron*.").

Nothing in the history of the regulation undermines that conclusion. Indeed, the original version of the regulation, promulgated in 1970, contained the same narrow definitions of "salesman," "partsman," and "mechanic." *See* 29 C.F.R.

§ 779.372(c)(1)-(3) (1970); *see also* Dep't of. Lab., Wage & Hour Div., Opinion Letter No. 660, 66-69 Lab. Cas. (CCH)¶ 30,652 (Aug. 4, 1967) (also providing the same narrow definitions). Those regulatory definitions have not changed in any relevant way since 1970. Because the agency's formal, regulatory position has not changed, the cases cited by Defendant are not on point. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012), the Supreme Court addressed what level of deference to give to an agency's interpretation of its own regulations. Importantly, the parties agreed that "the regulations themselves ... [were] entitled to deference under *Chevron*." *Id.* Similarly, *U.S. Steel*, 678 F.3d at 598-99, involved only opinion letters; the agency had not issued formal regulations.

It is true that the Department of Labor occasionally has adopted the broader definitions, urged by Defendant here, in documents other than regulations. For example, the agency issued an opinion letter in 1978 that defined a "salesman" to encompass service advisors. Dep't of Lab. Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978). Similarly, the agency amended its Field Operations Handbook in 1987 along the same lines. Field Operations Handbook, Dep't of Lab., Wage & Hour Div., 24L04-4, Insert No. 1757 (Oct. 20, 1987).

The agency even proposed amending the formal regulation to adopt the broader definitions. 73 Fed. Reg. 43,654-01, 43,658-59, 43,671 (July 28, 2008). But it ultimately decided *against* making that change after receiving comments from the public and considering the relevant court decisions. 76 Fed. Red. at 18,838.

The agency "acknowledge[d] that there are strongly held views on several of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes in developing this final rule." *Id.* at 18,832. The regulatory history shows that the Department of Labor has given this particular issue considerable thought and has concluded that the better reading of the statute is to "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838.

Moreover, even if we were to consider the agency's 2011 final rule a change of position, we still would conclude that *Chevron* supplies the appropriate standard of deference. As the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), an agency is permitted to change its position. Consistent with *Fox*, the agency here expressly acknowledged that its position was contrary to its earlier opinion letter, and the agency rationally explained why, in its view, the court decisions to the contrary were erroneous. Under *Fox*, 556 U.S. at 515-18, nothing more is required. *Cf. Perez v. Mortg. Bankers Ass'n*, No. 13-1041, 2015 WL 998535 (U.S. Mar. 9, 2015) (holding that an agency may change its position in an interpretive rule without notice and comment).

The Department of Labor's regulations consistently—for 45 years—have interpreted the statutory exemption to apply narrowly. The agency reaffirmed that interpretation most recently in 2011, after thorough consideration of opposing views and after a formal notice-and-comment process. Under

these circumstances, *Chevron* provides the appropriate legal standard.

C. At *Chevron* Step Two, the Regulation is Reasonable.

"Under *Chevron* step two, if the agency's interpretation is a reasonable one, this court may not substitute its own construction of the statutory provision." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (brackets and internal quotation marks omitted). Here, the Department of Labor has interpreted the statutory exemption to exclude service advisors by choosing the narrower definition of the term "salesman." For the reasons described below, we conclude that the agency has made a permissible choice. The interpretation accords with the presumption that the § 213 exemptions should be construed narrowly. *Haro*, 745 F.3d at 1256. Moreover, we are mindful of our role as a reviewing court: "The agency's interpretation need not be the best construction of the ambiguous statute." *Cervantes v. Holder*, 772 F.3d 583, 591 (9th Cir. 2014).

We recognize that our decision to uphold the agency's interpretation conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Brennan v. N. Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975) (unpublished), *aff'd sub. nom Dunlop v. N. Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (table); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975) (unpublished); *Yenney v. Cass Cnty. Motors Co.*,

No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977) (unpublished); *Thompson v. J. C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). We respectfully disagree with those decisions.

In *Deel Motors* and the district court opinions following that case in the 1970s, courts held that service advisors are exempt because their duties and pay structure are "functionally similar" to those of the salesmen, partsmen, and mechanics whom the statute expressly exempts. 475 F.2d at 1097 But those cases pre-dated *Chevron* and the modern framework for deferring to an agency's interpretation. *See id.* (asking not whether the agency's interpretation was reasonable but, instead, determining for itself "the best interpretation," "the better reasoned interpretation," and "a common sense interpretation"); *see also id.* at 1098 (concluding that "[t]he intended scope of [the exemption] is not entirely clear" but not considering deference to the agency's position). In that regard, we agree with the Fourth Circuit that "[the] 'functionally similar' inquiry cannot be squared with FLSA's plain statutory and regulatory language." *Walton*, 370 F.3d at 451. Nothing in the statutory text suggests that Congress meant to exempt salesmen, partsmen, mechanics, and any other employees with functionally similar job duties and pay structure; the text exempts only certain salesmen, partsmen, and mechanics.

The closer question is whether the agency's interpretation is unreasonable because it is unduly restrictive, as the Fourth Circuit held in *Walton* and

the Montana Supreme Court held in *Thompson*.[4] Those courts read § 213(b)(10)(A) as follows: "any salesman, partsman, or mechanic primarily engaged in [the general business of] selling or service automobiles." Service advisors are "salesmen" because their job is to sell services for cars. And service advisors are involved in the general business of "servicing automobiles," because their role is to help customers receive mechanical work on their cars. Accordingly, service advisors fall within the statutory definition. In effect, those courts held that that is the only reasonable reading of the statute.

The agency reads the statute differently: "any salesman, partsman, or mechanic primarily [and personally] engaged in selling or servicing automobiles." Service advisors may be "salesmen" in a generic sense, but they do not personally sell cars and they do not personally service cars. Accordingly, service advisors fall outside the statutory definition. In effect, the agency reads the statute as exempting salesmen who sell cars and partsmen and mechanics who service cars.

The Fourth Circuit rejected that interpretation as unreasonable because, with respect to "salesman," it purportedly reads out of the statute the second half of the disjunctive clause "'selling *or servicing automobiles*.'" *Walton*, 370 F.3d at 452 (emphasis by *Walton*) (quoting § 213(b)(10)(A)); *see also Thompson*, 294 P.3d at 402 ("A plain, grammatical reading of [the statute] makes clear that the term 'salesman'

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[4] *Walton* considered the issue at *Chevron* step two, whereas *Thompson* considered the issue at *Chevron* step one. Otherwise, the reasoning of both courts is largely the same.

encompasses a broader category of employees than those only engaged in selling vehicles" because of "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing'"). The Fourth Circuit's point is that, when Congress uses a list of disjunctive subjects (here, "salesman, partsman, or mechanic") followed by a list of disjunctive verbs (here, "selling or servicing"), the ordinary interpretation of that construction is that each subject is linked with each verb. For example, if someone says, "if my dogs or cats are eating or drinking, then I know not to pet them," we understand that phrase to be all-encompassing: the speaker refrains from petting a dog that is eating or drinking and a cat that is eating or drinking. It would contravene the speaker's intent to include, for example, only cats that were eating but to exclude dogs that were eating.

Critically, however, that analysis depends on context. Consider this slightly modified hypothetical: "if my dogs or cats are barking or meowing, then I know that they need to be let out." The Fourth Circuit's grammatical interpretation of that phrase would include a meowing dog and a barking cat. But most English speakers would interpret the sentence to refer only to a barking dog and a meowing cat. At a minimum, that implicit limitation would offer a reasonable interpretation of the speaker's intent.

Returning to the statute at hand, the agency's interpretation is reasonable. A natural reading of the text strongly suggests that Congress did not intend that both verb clauses would apply to all three subjects. For example, it is hard to imagine, in ordinary speech, a "mechanic primarily engaged in

selling ... automobiles." That is, it seems that Congress intended the subject "mechanic" to be connected to only one of the two verb clauses, "servicing." The nature of the word "mechanic" strongly implies the actions that the person would take—servicing. *See American Heritage College Dictionary* 842 (3d ed. 2000) (defining "mechanic" as a "worker skilled in making, using, or repairing machines, vehicles, and tools"). The same can be said of the subject "salesman." It is hard to imagine, in ordinary speech, "salesman ... primarily engaged in ... servicing automobiles." Congress likely intended the subject "salesman" to be connected to only one of the two verb clauses, "selling." The nature of the word "salesman" strongly implies the actions that the person would take—selling. *See id.* at 1203 (defining "salesman" as a "man who sells merchandise").

It is important to note that the agency's reading does not render any term meaningless or superfluous. All three subjects (salesman, partsman, and mechanic) and both verbs (selling and servicing) retain meaning; it is just that some of the verbs do not apply to some of the subjects. If the agency read out a word altogether, its interpretation likely would be unreasonable. *See, e.g., Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 966 (9th Cir. 2013) ("It is a well-established rule of statutory construction that courts should not interpret statutes in a way that renders a provision superfluous."), *cert. denied*, 134 S. Ct. 906 (2014). But the regulation does not run afoul of that doctrine.

Non-textual indicators of congressional intent, such as legislative history, are inconclusive. *See*

Fournier v, Sebelius, 718 F.3d 1110, 1123 (9th Cir. 2013) (holding that, at *Chevron* step two, "legislative history permissibly may be considered"), *cert. denied*, 134 S. Ct. 1501 (2014). We have found no mention, in the relevant reports or hearings, of service advisors, by name or by role. All references to "salesman" appear to refer to an employee who sells cars only. *See, e.g.*, 112 Cong. Rec. S20,504 (Aug. 24, 1966) (statement of Sen. Yarborough) ("It would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night."); *id.* ("The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different.").

In 1961, Congress exempted "any employee" of a car dealership. 29 U.S.C. § 213(a)(19) (1961); Pub. L. No. 87-30, § 9, 7S Stat. 65 (1961). A few years later, the Eighty-Ninth Congress considered three bills on this topic. The first bill, introduced in 1965, would have repealed altogether the exemption for employees of dealerships. H.R. 8259, 89th Cong. § 305 (introduced in House on May 18, 1965). The next bill, also introduced in 1965, would have exempted from overtime requirements "any salesman or mechanic employed by" a car dealership. H.R. 10,518, 89th Cong. § 209 (introduced in House on Aug. 17, 1965); H.R. 10,518, 89th Cong. § 209 (reported in House on Aug. 25, 1965). Neither of those bills passed.

The final bill—H.R. 13,712—was enacted into law on September 23, 1966.[5] The first three versions,

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[5] Defendant cites recent actions by the House of Representatives' Committee on Appropriations in an apparent

introduced in the first half of 1966, exempted either "any salesman or mechanic" or "any salesman, mechanic, or partsman" employed by a car dealership. H.R. 13,712, 89th Cong. § 209 (introduced in House on Mar. 16, 1965); *id.* (reported in House on Mar. 29, 1966); *id.* (referred in Senate on May 27, 1966). The final three versions all qualified the list of employees with the phrase, "primarily engaged in selling or servicing automobiles." *Id.* (reported in Senate on Aug. 23, 1966); *id.* (ordered to be printed in Senate on Aug. 25, 1966); Pub. L. No. 89-601 (Sept. 23, 1966). We know. then, that sometime in 1966 between May 27 and August 23, the Senate added that phrase. Unfortunately, the legislative history is silent on its meaning. *See, e.g.*, 112 Cong. Rec. H21,940 (Sept. 7, 1966) (House Conference Report: "The conference substitute conforms to the House provision regarding partsmen, except that such exemption shall be available only to salesmen, partsmen, and mechanics primarily engaged in selling or servicing such vehicles."); 112 Cong. Rec. S22,651 (Sept. 14, 1966) ("The resulting language follows the House exemption— including the Senate floor amendment— but with a somewhat narrower scope."); Sen. Comm.

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attempt to prevent enforcement by the agency of the 2011 rule. That appropriations rider is not relevant. What one house of Congress thinks, in the 2010s, about enforcement priorities for the agency is entirely uninformative about the intent of Congress when it enacted a statute in 1966. Moreover, enforcement priorities do not change the content of the statute. If the Appropriations Committee were to instruct, for instance, that it did not want money spent on enforcing the statutes forbidding cultivation of fewer than five marijuana plants on federal lands, such cultivation would not become lawful.

on Lab. & Pub. Welf., Report: No. 1487, p. 14, 89th Cong. (Aug. 23, 1966) ("Committee Report") ("Section 13(b) is amended to provide an overtime exemption for salesmen and mechanics who are primarily engaged in selling or servicing automobiles....").

The only possible exception, noted by *Deel Motors*, 475 F.2d at 1097 n.2, is found in the Committee Report on August 23, 1966:

> It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen (other than partsmen) employed by an automobile, trailer, truck, farm implement or aircraft dealership even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

Committee Report at 32. The Fifth Circuit quoted selectively from that passage for the proposition that the committee intended to exempt all mechanics and salesmen. *Deel Motors*, 475 F.2d at 1097 n.2. But the quoted passage also is found in earlier committee reports, which were written *before* the limiting phrase was added. *E.g.*, Sen. Comm. on Educ. & Lab., Report No. 871, p. 38, 89th Cong. (Aug. 25, 1965). Because the passage appeared both before and after the addition of the "primarily" proviso, the best reading of that passage is that the committee was addressing what

provisions apply to employees who work in separate buildings, not what types of salesmen are exempt.

In sum, there are good arguments supporting both interpretations of the exemption. But where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice. *Chevron*, 467 U.S. at 844. Accordingly, we hold that Plaintiffs are not exempt under 29 U.S.C. § 213(b)(10)(A).

Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ET AL.,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO,

Defendant-Appellee.

Filed: June 1, 2015

ORDER

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,* District Judge.

Judges Graber and Wardlaw have voted to deny Appellee's petition for rehearing en banc, and Judge Mahan has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

Appellee's petition for rehearing en banc is DENIED.

Appendix C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:12-cv-08051-RGK-MRW

NAVARRO, ET AL.,

Plaintiffs

v.

MERCEDES BENZ OF ENCINO,

Defendant.

Filed: January 25, 2013

(IN CHAMBERS) ORDER RE: DEFENDANT'S MOTION TO DISMISS

R. Gary Klausner, United States District Judge.

I. Introduction

On September 18, 2012, Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro (collectively "Plaintiffs") filed this complaint alleging nine claims against Mercedes Benz of Encino ("Defendant") for various violations of the Fair Labor Standards Act ("FLSA") and the California Labor Code.

On November 16, 2012, Defendant filed this Motion to Dismiss. The Court reviews Defendant's Motion to Dismiss as to four of the nine claims: (1) First Claim: violation of FLSA 29 U.S.C. § 207 for failure to pay overtime wages,[1] (2) Third Claim: violation of FLSA 29 U.S.C. § 206 for failure to pay minimum wage, (3) Fifth Claim: violation of FLSA 29 U.S.C. § 207 for failure to provide extra compensation for work completed during mandatory meal and rest periods, and (4) Seventh Claim: violation of FLSA 29 U.S.C. § 211 for failure to provide a written, itemized statement detailing hours worked and compensation received.

For the reasons stated below, the Court GRANTS Defendant's Motion to Dismiss. Additionally, the remaining claims are state claims over which the Court will not exercise supplemental jurisdiction. Therefore, the Court dismisses those claims for lack of subject matter jurisdiction.

II. Factual Background

With the exception of Plaintiff Reuben Castro, Plaintiffs are all current employees of Defendant. Plaintiff Reuben Castro is a former employee. Defendant owns and operates a Mercedes Benz automobile dealership in Encino, California. This business sells and services both new and used Mercedes Benz automobiles. Plaintiffs work (or have worked) at the dealership as Service Advisors.

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[1] The Court notes that Plaintiffs' Complaint alleges a violation of 29 U.S.C. § 201; however, the proper statutory basis for the allegations asserted in the first claim is 29 U.S.C. § 207.

As Service Advisors, the Plaintiffs must: (1) meet and greet Mercedes Benz owners as they enter the service area and evaluate their service and repair needs; (2) solicit service to be conducted on the vehicle; (3) solicit supplemental service to be performed on the vehicle; and (4) inform the vehicle owner about the status of the vehicle while Defendant's mechanics repair and service the vehicle. For every additional service or repair provided, the commission increases. Defendant pays Service Advisors, such as Plaintiffs, solely on this commission.

On September 18, 2012, Plaintiffs filed a complaint against Defendant alleging violations of both federal and state laws for failure to pay overtime, failure to pay minimum wage, failure to provide extra compensation for Plaintiffs' work during mandatory meal and rest periods, and failure to provide itemized wage statements to Plaintiffs. Additionally, Plaintiffs allege that because of these practices, Defendant has engaged in unfair competition in violation of California Business & Professions Code §17200.

III. Judicial Standard

To comply with Federal Rules of Civil Procedure 8, a complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Rule 12(b)(6), a party may move to dismiss a claim for failure to allege enough facts to comply with Rule 8.

In deciding a Rule 12(b)(6) motion, a court must assume allegations in the challenged complaint are true, and must construe the complaint in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F 3d 336, 337-38 (9th Cir.

1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The complaint need not contain detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a claim." *Twombly*, 550 U.S. at 555.

IV Discussion

Defendant argues Plaintiffs' claims should be dismissed for the following reasons: (1) Plaintiffs' First, Third, and Fifth Claims fail because Plaintiffs are exempt from the FLSA's maximum hour and minimum wage requirements; (2) alternatively, Plaintiffs' Third Claim fails because the Complaint pleads insufficient facts; (3) alternatively, Plaintiffs' Fifth Claim fails because § 207 does not require meal and rest periods; and (4) Plaintiffs' Seventh Claim fails because a violation of § 211 does not create a private right of action. The Court agrees.

A. First, Third, Fifth Claims Fail Based on Exemptions

Section 206 states, in pertinent part, that every employer shall pay to each of his employees not less than $7.25 an hour. 29 U.S.C. § 206(a)(1)(C). Section 207 states no employer shall employ any employee for a workweek longer than forty hours unless the employee receives additional compensation specified at a rate not less than one-half the regular rate at which the employer generally pays the employee. 29 U.S.C. §207(a).

Section 213 creates an exemption to the above provision for "any salesman, partsman, or mechanic

primarily engaged in selling or servicing automobiles ... if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Courts have applied this exemption to Service Advisors. See *Brennan v. Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973) ("... a common sense interpretation and application of this exemption mandates inclusion of service salesmen within its scope."); *Walton v. Greenbrier Ford*, 370 F.3d 446, 453 (4th Cir. 2004).

The Department of Labor ("DOL"), however, has expressly rejected this interpretation. The DOL defines a salesman as an employee "primarily engaged in making sales or obtaining orders or contracts for sale of automobiles." 29 C.F.R. § 779.372(c)(1). A mechanic is an employee "primarily engaged in doing mechanical work in the servicing of an automobile." 29 C.F.R. § 779.372(c)(3). In a "final rule," the Wage and Hour Division of the DOL explained that "[t]he Department notes that current § 779.372(c)(1) ... limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832-01 (April 5, 2011). Thus, under the DOL's enforcement of § 213(b)(10)(A), Service Advisors are not exempt from the hour/wage requirements set forth in §§ 206 and 207

Given the conflicting interpretations, the Court must first look to the statutory language. Where the statutory language is clear, the Court is bound by such language as a clear expression of legislative intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council, 467 U.S. 837, 842-43 (1984). Where the statutory language is ambiguous, however, the Court accords deference to the DOL action based on the nature of that action. "Legislative regulations" are given a high level of judicial deference, and will stand unless arbitrary or capricious. *Id.* at 844. Mere "interpretations," however, are accorded lower deference, and will stand only so long as they are reasonable. *Id.*

1. The Statutory Language is Ambiguous as Applied to Service Advisors

Here, the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors. However, the job description of a Service Advisor encompasses those of both a salesman and a mechanic, and falls squarely within the category of positions exempted by the provision. The legislative history demonstrates an intent to "narrow significantly the reach of the automobile dealership employee exemption." *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001). Nonetheless, it is not clear that Congress intended Service Advisors to be excluded, particularly when their job duties are simply a hybrid of two jobs expressly listed within the exemption. For this reason, the Court finds § 213(b)(10)(A) ambiguous as applied to Service Advisors. See *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973) ("The intended scope of [the exemption] is not entirely clear. Indeed, the Secretary's own interpretation of the coverage of that section is not altogether consistent.").

2. The DOL's Interpretation is not Reasonable

In light of the finding above, the Court's role is to "determine whether the agency's interpretation is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As previously stated, the permissiveness of the agency's construction depends upon the nature of the agency action, as allowed by Congress. When Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency." *Id.* at 844. In such a case, agency decisions are "legislative regulations" that are given "controlling weight unless they are arbitrary. capricious, or manifestly contrary to the statute." *Id.* When Congress has not left such an explicit gap, agency actions are mere interpretations that are upheld only if reasonable. *Id.*

Within the § 213 arena, the U.S. Supreme Court has found agency action to constitute "legislative regulation." See *Auer v. Robbins*, 519 U.S. 452 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). However, in those cases, the specific provisions being reviewed expressly grant the Secretary of Labor the power to "defin[e] and delimi[t]" the terms in the section. *Id.* As such, the Court found that the statute creates an explicit gap for the agency to fill. *Id.* at 172. This case is distinguishable. Here, the applicable section, § 213(10)(b)(A), does not contain any such language. It is clear that where Congress intended to grant the agency power to create legislative regulation, it included language to that effect. In the absence of similar language, this Court will not read into the statute the grant of such power. Therefore, the

Court finds that the agency action is not a legislative regulation, but rather, a mere interpretation, which is accorded lower deference.

Having established that the DOL's action is an interpretation, the Court is bound to the DOL interpretation only if the interpretation is reasonable. *Chevron*, 467 U.S. at 844. The Court agrees with both the Fourth and Fifth Circuits, and holds that the DOL interpretation of § 213(b)(10)(A) is unreasonable. When faced with facts nearly identical to those of the present case, the Fourth Circuit concluded that the "Secretary's interpretation of ... [salesman] is unreasonable, as it is an impermissibly restrictive construction of the statute." *Walton*, 370 F.3d at 452. Similarly, the Fifth Circuit explained that "[i]n the absence of clear intent to the contrary, we cannot assume that Congress intended to treat employees with functionally similar positions differently." *Brennan*, 475 F.2d at 1097-98. Service Advisors, such as Plaintiffs, are functionally equivalent to salesmen and mechanics and are similarly responsible for the "selling and servicing" of automobiles. Accordingly. the Court finds the DOL's interpretation unreasonable. As such, the Court finds that Service Advisors fall within the exemption of § 213(b)(10)(A).

The Court dismisses Plaintiffs' first, third, and fifth claims, which all allege violations of §§ 206 and 207

B. Third Claim Fails to Allege Sufficient Facts

As discussed above, the minimum wage requirements established in § 206 do not apply to Plaintiffs because Service Advisors are exempt under § 213(b)(10)(A). Even if they did apply, however,

Plaintiff's Third Claim fails to plead sufficient facts to survive a Rule 12(b)(6) Motion.

Legal conclusions alone, without some factual allegations, do not provide fair notice of the nature of the claim nor the grounds on which the claim rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556. Here, Plaintiffs allege only that Defendant (1) failed to provide an hourly wage, (2) paid Plaintiffs on a pure commission basis, (3) required Plaintiffs to work for wages less than the legal minimum, and (4) refused to pay minimum wages. A salary based solely on commission can still satisfy the minimum wage requirement. See 29 C.F.R. § 778.117. No facts demonstrate that the commissions Plaintiffs earned do not satisfy the minimum wage requirements. Even if a Motion to Dismiss is not designed to correct inartistic pleading, as Plaintiff argues, these legal conclusions alone are insufficient to survive a Rule 12(b)(6) Motion.

C. Fifth Claim Fails to State a Claim

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with overtime compensation in violation of § 207, this Section does not apply to Service Advisors. As discussed above, Plaintiffs are exempt under § 213(b)(10)(A).

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with meal or rest periods, neither § 207 nor the cited DOL regulations mandate rest and meal periods. Section 785.18 simply states that: "Rest periods of short duration, running from 5 minutes to about 20 minutes... must be counted as hours worked." 29 C.F.R.§ 785.18. Section 785.19 states that "[b]ona fide meal periods are not worktime

... The employee must be completely relieved from duty for the purposes of eating regular meals ... The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." 29 C.F.R. § 785.19. These statutes simply determine when employees must be compensated for working during these periods, but do not require an employer to provide their employees with meal or rest periods. On this ground, the Court dismisses Plaintiff's Fifth Claim.

D. Seventh Claim Fails Because § 211 Does Not Create a Private Right of Action

Section 29 U.S.C. § 211 states: "Every employer subject to any provision of this chapter ... shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records..." Section 217 authorizes only the Secretary to initiate injunction proceedings involving an employer's failure to comply with the record keeping requirements. 29 U.S.C. § 217 Put simply, § 211(c) does not create a private action against an employer for failure to comply with the record-keeping provisions. *Elwell v. University Hospitals Home Care Services*, 276 F. 3d 832, 843 (6th Cir. 2002). Therefore, the Court dismisses Plaintiff's Seventh Claim.

E. The Remaining State Law Causes of Action

Having dismissed all federal claims alleged, the Court exercises its discretion under 28 U.S.C. § 1367(c) to dismiss the remaining state law causes of action for lack of subject matter jurisdiction.

V Conclusion

The Court GRANTS Defendant's Motion to Dismiss as to Plaintiffs' First, Third, Fifth, and Seventh claims. The Court *sua sponte* DISMISSES the remaining state law causes of action. As such, Plaintiffs' Complaint is dismissed in its entirety.

IT IS SO ORDERED.

Appendix D

29 U.S.C. § 213
EXEMPTIONS

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary. subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, §3(c)(1), Nov 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or

religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101–157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who

did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93–259, §23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93–259, §10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93–259, §§9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93–259, §11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93–259, §21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95–151, §14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction

operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93–259, §§15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95–151, §5, Nov 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93–259, §10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub. L. 95–151, §§6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee

employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child

employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if--

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5–1990 for scrap paper balers and Standard ANSI Z245.2–1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the

scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after

the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the

same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title,

except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but

materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily

engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday. and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may

be included for such purposes in any other fifty-two week period.

Appendix E

29 C.F.R. § 779.372 NONMANUFACTURING ESTABLISHMENTS WITH CERTAIN EXEMPT EMPLOYEES UNDER SECTION 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to "any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of the term "employed by" is contained in §§779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to

establishments selling automobiles, trucks, and farm implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such

nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishment's annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

No. 15–415

In The Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

KEVEN STEINBERG
THOMPSON, COE AND O'MEARA
12100 WILSHIRE BLVD.
SUITE 1200
LOS ANGELES, CA
90025
(310) 954–2362

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746–2297
SBIBAS@LAW.UPENN.EDU

QUESTION PRESENTED

Service advisors at automobile dealerships meet and greet customers, write up their requests for automobile services, suggest additional work, and forward these work orders to other dealership employees. The Fair Labor Standards Act (FLSA) generally guarantees dealership employees time-and-a-half compensation for overtime, but exempts three enumerated types of dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). In its 2011 final rule, promulgated after notice-and-comment rulemaking, the Department of Labor adhered to its position that service advisors do not fall within this exemption. 29 C.F.R. § 779.372(c); 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011).

The questions presented are:

When interpreting the FLSA's automobile salesman/partsman/mechanic exemption in accordance with *Chevron*:

1. Does the statutory exemption unambiguously apply or not apply to service advisors?

2. Is the Department of Labor's 2011 legislative regulation a permissible construction of the statute?

PARTIES TO THE PROCEEDING

Respondents Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the court of appeals. Respondent Mike Shirinian was erroneously omitted from the caption of the court of appeals' opinion, although the court's opinion included his name in its discussion of the factual and procedural history. A motion to correct the caption is pending in the court of appeals.

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the court of appeals.

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees nonexempt employees time-and-a-half pay for work beyond forty hours per week. 29 U.S.C. § 207 For several years beginning in 1961, the statute exempted all automobile dealership employees, but in 1966 Congress narrowed the exemption to three enumerated types of dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s]." *Id.* § 213(b)(10)(A). The statute further limits the exemption to those employees who are "primarily engaged in selling or servicing automobiles." *Id.*

In 1970, in keeping with this enumeration, the Department of Labor (DoL) interpreted the statute not to exempt employees known as "service advisors." In 2011, after notice-and-comment rulemaking, DoL issued a final legislative regulation, adhering to its original position and declining to broaden this exemption to cover service advisors. DoL recognized that service advisors are neither car salesmen nor partsmen nor mechanics, and that they neither sell nor service cars, let alone "primarily" do so.

This is the first case in which a court of appeals has considered the statute's application to service advisors since DoL issued its 2011 legislative regulation. The court properly deferred, under *Chevron*, to DoL's delegated authority to implement the FLSA. *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The three allegedly contrary cases cited by petitioner all arose before the 2011 legislative regulation and thus presented a different

legal issue. Because the circuits do not disagree about the import of DoL's 2011 legislative regulation, there is no need for this Court to intervene. Moreover, those three cases (over the past forty-two years) either predated *Chevron* or did not apply this Court's *Chevron* precedent concerning the FLSA.

In any event, the importance of the decision below is greatly limited by the existence of another overtime exemption in the FLSA, which may apply elsewhere even when this one does not. And the skeletal record makes this case a poor vehicle. Further review is unwarranted.

STATEMENT

A. Statutory and Regulatory Background

1. *The FLSA Requires Overtime Pay for All Employees Except Those Specifically Exempted.* The FLSA's purpose is to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Thus, it generally requires employers to pay time-and-a-half for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). Congress exempted specific types of employees from this overtime-pay mandate. *See* 29 U.S.C. §§ 207, 213.

In 1961, Congress passed a blanket exemption from the FLSA for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19)

(1964)). Thus, all automobile dealership employees were exempt from the overtime-pay requirement, regardless of whether they were salesmen, receptionists, managers, mechanics, partsmen, accountants, car washers, or janitors.

2. *In 1966, Congress Narrowed the Automobile Dealership Exemption to Salesmen, Partsmen, and Mechanics.* Five years later, in 1966, Congress narrowed the exemption to three types of employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836. In 1974, Congress re-enacted this provision without any germane change. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65 (adding exemption for boat salesmen and removing it for trailer and aircraft partsmen and mechanics).

Both the 1966 and 1974 statutes expressly authorized DoL to promulgate regulations implementing these amendments. *Id.* § 29(b), 88 Stat. at 76; Pub. L. No. 89-601, § 602, 80 Stat. at 844.

3. *DoL's 1970 Interpretive Regulation Declined to Exempt Service Advisors.* In 1970, DoL issued an interpretive regulation clarifying that service advisors do not qualify for the salesman/partsman/mechanic exemption: "Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves

primarily engaged in the work of a salesman, partsman, or mechanic . . . are not exempt under section 13(b)(10)." 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). DoL noted that service advisors' main tasks of diagnosing automobiles' repair needs, writing up work orders, and assigning and supervising mechanics' work did not make them exempt. 35 Fed. Reg. at 5896. DoL explicitly described the 1970 rule as interpretive and did not promulgate it via notice-and-comment rulemaking procedures. *Id.* at 5856.

4. *In 2011, After Notice-and-Comment Rulemaking, DoL Declined to Read the FLSA Exemption to Apply to Service Advisors.* Following some lower court cases that had refused to defer to the 1970 interpretive rule, DoL issued nonbinding enforcement materials, declining for a time to enforce the FLSA's overtime provisions with respect to service advisors.[1] The agency noted that officially changing the agency's position to exempt service advisors would require revising the 1970 interpretive rule, but did not take formal action to change its position.

In 2008, DoL considered formally amending the 1970 interpretive rule to treat service advisors as

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[1] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., INSERT NO. 1757, FIELD OPERATIONS HANDBOOK 24L04–4(k) (1987). DoL counsels that it discloses its Field Operations Handbook to satisfy its obligations under the Freedom of Information Act, 5 U.S.C. § 552(a)(2), and that the Handbook "is not used as a device for establishing interpretative policy." *See* U.S. Dep't of Labor, Wage & Hour Div., *Field Operations Handbook*, U.S. DEP'T LAB., http://www.dol.gov/whd/FOH/ (last updated Aug. 13, 2013).

exempt and issued a notice of proposed rulemaking on the subject. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008). Five of the seven relevant comments opposed the proposed change. These included joint comments from twelve Members of Congress, including the chairs of the House Committee on Education and Labor; the Senate Committee on Health, Education, Labor, and Pensions; the House Subcommittee on Workforce Protections; and the Senate Subcommittee on Employment and Workplace Safety. George Miller (Chairman, House Committee on Education & Labor) et al., Comment Letter on Proposed Rule to Update Regulations Issued Under the FLSA (Sept. 26, 2008), at 7, http://tinyurl.com/qfrrfz9.

In 2011, after considering all of the comments submitted, DoL declined to broaden the exemption to include service advisors. It agreed with the majority of commenters that "the exemption should not be extended to employees outside its plain language," such as service advisors, who "merely coordinate" with exempt employees. 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011).

Thus, after its notice-and-comment period, DoL "concluded that current [29 C.F.R. §] 779.372(c) sets forth the appropriate approach to determining whether [service advisors] are subject to the exemption." *Id.* In essence, the agency ratified its original interpretation and promulgated it as a legislative regulation.

The final regulation defines the three exempt types of employees, in relevant part, as follows:

> "[A] salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale *of the automobiles*, trucks, or farm implements that the establishment is primarily engaged in selling."
>
> "[A] partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts."
>
> "[A] mechanic is any employee primarily engaged in doing mechanical work in the servicing of an automobile, truck or farm implement for its use and operation as such."

29 C.F.R. § 779.372(c)(1)–(3) (emphasis added).

B. Facts and Procedural History

1. *Facts.* Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz auto dealership in the Los Angeles area. Compl. ¶¶ 9, 15, 18. Their job was to "meet and greet" customers, listen to their complaints, "evaluate the[ir] service and/or repair needs[,] solicit and suggest that supplemental service be performed," and "write up an estimate." *Id.* ¶ 16. Petitioner required them to work from 7 a.m. to 6 p.m. at least five days per week, totaling a weekly minimum of 55 hours. *Id.* ¶ 15.

2. *The District Court's Dismissal.* In 2012, respondents filed suit in federal district court, alleging various violations of the FLSA and state law. Count One, at issue here, alleged that petitioner violated

the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. *Id.* ¶¶ 24–31. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A).

The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 27. But, viewing DoL's regulation as "mere[ly] interpret[ive]" rather than legislative, the court "accorded [it] lower deference." Pet. App. 29. Because it saw service advisors as "functionally equivalent to salesmen and mechanics," the district court rejected the regulation as "unreasonable." *Id.* After dismissing respondents' other FLSA claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. Pet. App. 29–31.

3. *The Court of Appeals' Reversal.* The court of appeals reversed the dismissal of the FLSA overtime claim. The court observed that "[petitioner] concede[d] that [respondents] do not meet the regulatory definitions" of salesmen, partsmen, or mechanics. Pet. App. 5. Since DoL had reaffirmed its position in 2011 after notice-and-comment rulemaking, the court of appeals evaluated the regulation under *Chevron*. Pet. App. 10–11.

At *Chevron* step one, the court rejected petitioner's argument that the statute unambiguously exempts service advisors on petitioner's theory that they are salesmen who service automobiles. Pet. App. 6–8. The court adverted briefly to this Court's canon of construing FLSA exemptions narrowly. Pet. App. 6 & n.3.

At *Chevron* step two, the court found DoL's interpretation of the statute reasonable and therefore entitled to deference. The noun "salesman," it noted, relates directly to the gerund "selling," but not to "servicing." Pet. App. 13–15. The court declined to follow decisions predating the 2011 legislative regulation, which had no reason to address, and had not addressed, the reasonableness of the 2011 regulation under *Chevron*. Pet. App. 11–12. Those decisions had not limited the exemption to the three statutorily enumerated types of employees. Instead, they had extended it to service advisors, either on the theory that their duties are "'functionally similar'" to those of salesmen, partsmen, and mechanics, or on the theory that service advisors are salesmen who sell services. Pet. App. 12–13 (quoting *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973), and citing *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004)).

The court of appeals thus unanimously reversed the dismissal of the FLSA overtime claim and supplemental state-law claims and remanded for further proceedings. Pet. App. 19. Petitioner filed a petition for rehearing en banc, but no judge requested a vote on it. Pet. App. 20.

REASONS FOR DENYING THE PETITION

Nothing about this case calls for this Court's intervention. DoL's 2011 legislative regulation, adopted after notice-and-comment rulemaking, tracks the plain meaning of the statutory salesman/partsman/mechanic exemption and is a reasoned interpretation of the statute. The decision below is the first to

interpret the 2011 legislative regulation, rests on a skeletal record, and is of limited importance, as industry commentators themselves acknowledge.

I. There is no division of authority. Of the three federal court of appeals and state supreme court cases (over the past forty-two years) cited by petitioner, none arose after the 2011 legislative regulation at issue here. Moreover, all of the federal cases predated either *Chevron* or this Court's precedent applying *Chevron* deference to FLSA exemptions under 29 U.S.C. § 213.

II. The decision below is correct. Congress delegated statutory authority to DoL to implement the FLSA Amendments' exemptions. After notice-and-comment rulemaking, the agency did so by promulgating the 2011 legislative regulation, 29 C.F.R. § 779.372(c). That legislative regulation qualifies for *Chevron* deference and is valid as a reasonable interpretation of the statute, 29 U.S.C. § 213(b)(10)(A).

A. At *Chevron* step one, the statute does not unambiguously exempt service advisors; if anything, it unambiguously does the opposite. The exemption covers only salesmen, partsmen, and mechanics primarily engaged in selling or servicing automobiles. Service advisors are not automobile salesmen, and selling services does not qualify as selling automobiles. Nor do service advisors service automobiles. Stretching "servicing" to include the "general process of servicing," as petitioner does (at 25, 26), would reenact the blanket automobile dealership exemption that Congress repealed in 1966. It is far more natural to read the statute as providing that salesmen sell automobiles but do not service them. This

Court's longstanding canon of narrowly construing FLSA exemptions simply reinforces the plain import of the text.

B. At *Chevron* step two, the legislative regulation is a valid, reasonable interpretation of the statute. After notice-and-comment rulemaking, DoL agreed with the weight of the comments and read the statute according to its natural meaning, rather than expanding it. It also acted reasonably in reaffirming its longstanding 1970 interpretive rule. Post-*Chevron*, DoL was no longer required to continue acceding indefinitely to pre-*Chevron* decisions that had refused to defer to the 1970 interpretive rule.

III. The question presented is of limited importance. Industry commentators have asserted that another FLSA exemption for specified employees, 29 U.S.C. § 207(i), may cover most service advisors regardless of whether § 213(b)(10)(A) does. In addition, the facts of this case are poorly developed, making it a poor vehicle. Finally, there is no danger of forum-shopping given the rigorous prerequisites for FLSA collective actions and the individualized showings necessitated by the possibility of the § 207(i) defense.

I. COURTS ARE NOT DIVIDED ON WHETHER DOL'S 2011 LEGISLATIVE REGULATION WARRANTS *CHEVRON* DEFERENCE

There is no division of authority on the pertinent question: whether, in a suit arising after DoL promulgated its 2011 legislative regulation, automobile dealership service advisors are exempt from the

FLSA's overtime requirement. The decision below is the only one to address that question. All three of the federal court of appeals and state supreme court cases cited by petitioner arose before 2011. Moreover, all of the federal cases predate *Chevron* itself or this Court's later precedent applying *Chevron* to DoL regulations implementing FLSA overtime exemptions. If faced with a post-2011 case involving service advisors again, all of these courts would be free to follow the decision below.

A. No Other Federal Court Has Addressed the Issue Since 2011, Nor Has Any Applied This Court's Recent *Chevron* Precedent on FLSA Exemptions

1. *The Fifth Circuit.* Petitioner claims that the decision below conflicts with the Fifth Circuit's 1973 decision in *Brennan* v. *Deel Motors*. Pet. 20 (citing *Brennan*, 475 F.2d 1095). Petitioner fails to acknowledge that *Brennan* was decided before *Chevron* and before DoL's 2011 legislative regulation. Thus, *Brennan* is no longer controlling precedent on the treatment of service advisors even in the Fifth Circuit.

In *Brennan*, the Fifth Circuit viewed "the intended scope of [29 U.S.C. § 2]13(b)(10) [a]s not entirely clear." 475 F.2d at 1098. Since this Court had not yet decided *Chevron*, and DoL had not yet engaged in notice-and-comment rulemaking on the status of service advisors, the Fifth Circuit mentioned DoL's 1970 interpretation of the overtime exemption only in passing, buried in a footnote. *Id.* at 1098 n.3. Instead of deferring to DoL, the court engaged in its

own analysis to determine its view of "the best interpretation of this section" of the statute, and "assume[d] that Congress intended to treat employees with functionally similar positions" alike. *Id.* at 1097–98. The court did not explain how to determine what positions were "functionally similar" to those enumerated in the statute.

After *Chevron* and DoL's 2011 legislative regulation, *Brennan* is no longer good law. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (emphasis added). *Brennan* was not based on statutory clarity; on the contrary, it found the scope of the statutory exemption "not entirely clear." 475 F.2d at 1098.[2]

2. *Fourth Circuit.* The only other federal appellate decision relied on by petitioner is likewise inapposite, because it predated the 2011 legislative regulation. It also does not survive later decisions of this Court.

In *Walton* v. *Greenbrier Ford*, the Fourth Circuit refused to afford *Chevron* deference to DoL's 1970 interpretation of the statutory exemption because it found that "29 C.F.R. § 779.372(c)(1) is interpreta-

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[2] The three mid-1970s, unpublished district court decisions cited by petitioner (at 21) all relied on *Brennan* and predated *Chevron* and the 2011 legislative regulation. Moreover, district court decisions cannot create a circuit split.

tive as it construes the statutory term 'salesman.'" 370 F.3d at 452. The Fourth Circuit instead applied a lesser standard of deference, which it had derived from a tax decision of this Court, *National Muffler Dealers*. *See Walton*, 370 F.3d at 452 (quoting *Pelissero* v. *Thompson*, 170 F.3d 442, 446 (4th Cir. 1999) (citing *Nat'l Muffler Dealers Ass'n, Inc.* v. *United States*, 440 U.S. 472, 476 (1979)).

Walton predated DoL's 2011 legislative regulation, however, and does not survive this Court's later decisions in *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007), and *Mayo Foundation for Medical Education & Research* v. *United States*, 562 U.S. 44 (2011). In *Long Island Care*, this Court unanimously rejected the argument that another DoL regulation, also interpreting an overtime exemption of the FLSA, should be afforded lesser weight as merely an "interpretive" regulation. 551 U.S. at 174. The Court explained that the FLSA provides the Secretary of Labor with the power to issue "rules and regulations." *Id.* at 165. *Chevron* deference is warranted, the Court concluded, "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable." *Id.* at 173.

Reaffirming *Long Island Care*, this Court in *Mayo Foundation* held that the lesser standard of deference set forth in *National Muffler Dealers Association* no longer applies, even in the context of tax regulations adopted by the Treasury Department af-

ter notice-and-comment rulemaking. 562 U.S. at 58 (quoting *Long Island Care*, 551 U.S. at 173).

The Fourth Circuit has not revisited the application of the FLSA's overtime provisions to service advisors since *Long Island Care*, *Mayo Foundation*, and the 2011 notice-and-comment rulemaking, which gave 29 C.F.R. § 779.372(c) the status of a legislative regulation. There is thus no divergence in federal authority for this Court to resolve.

B. There Is No Conflict with Any State Supreme Court

The only state-court authority cited by petitioner likewise arose before the 2011 legislative regulation took effect. In *Thompson* v. *J.C. Billion, Inc.*, the plaintiff worked as a service manager at an automobile dealership from March 2009 through July 2010 and filed his complaint several months later. 294 P.3d 397, 398–99 (Mont. 2013). Thus, the Montana court had no occasion to consider or accord any weight to the 2011 rulemaking, because the actions complained of predated 2011.

Neither party in *Thompson* briefed or argued whether the 2011 regulation could be applied retroactively and thus merited independent weight. Nor did the Montana Supreme Court discuss retroactivity. The sole mention of retroactivity was of a distinct retroactivity concern in an amicus brief, which urged that it would be "unfair to retroactively apply a standard to dealers." Brief of Amicus Montana Automobile Dealers Ass'n at 10–11, *Thompson* v. *J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013) (No. DA 12-0244) (citing *Bowen* v. *Georgetown Univ. Hosp.*,

488 U.S. 204 (1988) (articulating a strong presumption against applying regulations retroactively)). The Montana Supreme Court did not consider the 2011 legislative regulation as an independent basis for deciding the case. Rather, the court described the 2011 rule as a "subsequent[] expla[nation]" of the 1970 rule and a "rever[sion] back to the [1970] position." 294 P.3d at 401, 403 n.7.

Since the 2011 regulation could not have applied retroactively in *Thompson*, the question presented here was not properly before the Montana Supreme Court. Petitioner has not cited, and we are not aware of, any other state court decision on the applicability of the salesman/partsman/mechanic exemption to service advisors since 2011.

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO DOL'S 2011 NOTICE-AND-COMMENT DETERMINATION THAT SERVICE ADVISORS ARE NOT EXEMPT

In 2011, after notice-and-comment rulemaking, DoL properly declined to extend the FLSA's salesman/partsman/mechanic exemption to cover service advisors. 76 Fed. Reg. at 18,838. The court of appeals correctly deferred under *Chevron* to DoL's expertise and delegated authority to implement 29 U.S.C. § 213(b)(10)(A).

Petitioner's arguments fail in part because they rest on two fundamental misconceptions. Petitioner claims, first, that DoL lacks authority to implement § 213(b)(10)(A), and, second, that the 2011 rulemaking did not result in a legislative regulation. Pet. 29. Both claims are wrong.

First, both the 1966 and 1974 FLSA Amendments, which respectively enacted and reenacted the automobile salesman/partsman/mechanic exemption, gave the Secretary of Labor authority "to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act." Pub. L. No. 89–601, § 602, 80 Stat. at 844; *accord* Pub. L. No. 93–259, § 29(b), 88 Stat. at 76; *see Long Island Care*, 551 U.S. at 165 (relying on the latter subsection). Whether an agency interpretation warrants full *Chevron* deference "does not turn on whether Congress's delegation of authority was general or specific." *Mayo Found.*, 562 U.S. at 57.

Second, DoL's 2011 rulemaking was not merely "interpretive" and so subject to less than full *Chevron* deference. Pet. 29. In *Long Island Care*, this Court unanimously held that DoL's notice-and-comment regulations concerning another overtime exemption (29 U.S.C. § 213(a)(15)) merit full *Chevron* deference. 551 U.S. at 171–74. Considering that "Congress delegated authority to the [DoL] generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," with full notice-and-comment procedures, the court of appeals properly applied *Chevron*'s framework. *United States* v. *Mead*, 533 U.S. 218, 226–27 (2001); *accord id.* at 229–31 (explaining that notice-and-comment rulemaking is "significant in pointing to *Chevron* authority").

Under *Chevron*, unless "[1] Congress has directly spoken to the precise question at issue, [2] the question for the court is whether the agency's an-

swer is based on a permissible construction of the statute." 467 U.S. at 842–43. Here, the court of appeals correctly deferred to DoL's 2011 legislative regulation under *Chevron*, rejecting petitioner's arguments at both step one and step two. Indeed, the court of appeals would have been justified in ruling for respondents at *Chevron* step one.

A. The Plain Text of the FLSA's Overtime Exemption for Salesmen, Partsmen, and Mechanics Does Not Unambiguously Cover Service Advisors

1. At *Chevron* step one, the court of appeals correctly rejected petitioner's argument that § 213(b)(10)(A) unambiguously exempts service advisors from the FLSA's overtime requirement. Out of dozens of automobile dealership jobs, including porters, painters, upholsterers, leasing agents, title examiners, car washers, and warranty salesmen, Congress explicitly listed three, and service advisor is not one of them. Moreover, the classification of service advisors was well-established in the industry when Congress enacted the exemption in 1966. U.S. DEP'T OF LABOR, *Automobile Service Advisors*, *in* OCCUPATIONAL OUTLOOK HANDBOOK, BULLETIN NO. 1450, at 314–17 (1966–67 ed.).

That should end the matter, based on the canon *expressio unius est exclusio alterius*. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S.

19, 28 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

This is a textbook example of Congress's selecting and enumerating certain "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)). Particularly since Congress repealed the 1961 exemption covering all dealership employees and substituted one limited to just three enumerated types of employees, it would contradict Congress's manifest intent to expand its carefully enumerated list.

2. Petitioner erroneously asserts, however, that service advisors are clearly covered by the exemption because they are supposedly "salesmen." Pet. 23–24. Even if this reading were not clearly wrong, at most the statute would be ambiguous on this point. In common parlance, a *sales*man is one who *sells* something, making a *sale*; both the nouns and the transitive verb share the same etymological root, **saljan*. *See* 14 OXFORD ENGLISH DICTIONARY 391, 934, 388 (2d ed. 1989); 4 WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2204, 2272, 2203 (2d ed. 1956) (hereinafter "WEBSTER'S SECOND").

The direct object of the gerund "selling" in the statute is "automobiles"; the statute does not exempt employees primarily engaged in selling leases, warranties, insurance, underbody coatings, or—as petitioner would have it—services. *See, e.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–*5 (10th Cir. Apr. 25, 2003) (unpublished)

(declining to exempt finance managers as salesmen because they sell extended warranty options, not cars); *Gieg* v. *Howarth*, 244 F.3d 775, 776-77 (9th Cir. 2001) (same, for finance writers, because they sell financing and warranties, not cars). Petitioner's own amicus has explained that "[e]mployees primarily engaged in automobile leasing **are not *salesmen*** under this exemption, since they are not selling vehicles to ultimate purchasers." NAT'L AUTO. DEALERS ASS'N, A DEALER GUIDE TO THE FAIR LABOR STANDARDS AND EQUAL PAY ACTS 12 (2005) (emphases in original). DoL's regulation has not "divided a dealership's salesforce in half," as petitioner argues (at 2); the statute itself limits "salesmen" to employees "selling automobiles." 29 U.S.C. § 213(b)(10)(A).

3. Nor can one stretch the statutory phrase "servicing automobiles" to mean "sell[ing] services," as petitioner would have it. Pet. 2, 31. The Oxford English Dictionary's *first* definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle, etc." 15 OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989); *see also* 4 WEBSTER'S SECOND 2288 ("To perform services of maintenance, supply, repair, installation, distribution, etc. for or upon; as, to *service* a car, a radio set, a ship, a territory.").[3]

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[3] Other dictionaries likewise list this as the first definition of the transitive verb "service." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1304 (1966) ("[T]o make fit for use; repair; restore to condition for service: *to service an automobile.*"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1185 (1981); GARNER'S DICTIONARY OF LEGAL USAGE 811 (3d ed. 2011) ("'[T]o provide service for' <the mechanic serviced the copying machine>").

Congress has repeatedly used this common-sense definition of "servicing" in the United States Code. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery, and checking and adding oil." 2 U.S.C. § 2025(b); *see also, e.g.*, 42 U.S.C. § 7671h(c) ("[N]o person repairing or servicing motor vehicles . . may perform such service unless such person has been properly trained and certified."). Yet petitioner claims, counterintuitively, not just that salesmen *can* service automobiles, but that the statute *unambiguously includes* the unlikely category of "salesmen primarily engaged in servicing automobiles." Pet. 23–24. It is far more natural to read the statute as recognizing that salesmen sell automobiles, and other employees service automobiles.

4. Petitioner mischaracterizes DoL's reasoning as improperly injecting the word "personally" into § 213(b)(10)(A). Pet. 25–26. But the word "personally" appears nowhere in the 1970 or 2011 regulation or preamble. The court of appeals used "personally" only in passing, to emphasize that the regulation comports with the plain meaning of "servicing." Pet. App. 13.

Rather, it is petitioner who asks this Court to inject a new element into the statute to exempt service advisors, on the theory that they are part of the "process," "process of," or "general process of" servicing automobiles. Pet. 1, 2, 3, 10, 15, 24, 25, 26. Petitioner's reading would effectively reinstate the 1961 blanket dealership exemption that covered all of a

dealership's employees, even though Congress repealed that exemption in 1966. Nearly everyone in a dealership is part of the "general process of" sales or service, including managers, accountants, receptionists, cashiers, cleaning crews, lot attendants, and advertising and marketing employees. But instead of maintaining the exemption for all of them, Congress deliberately limited the exemption to the three enumerated types of employees.

5. Petitioner claims that exempting partsmen but not service advisors would create an "anomaly," on the unsupported and incorrect assertion that "partsmen who personally service automobiles is a null set." Pet. 26. This objection misses the mark. This case is about service advisors, not partsmen, and partsmen are explicitly named in the exemption, while service advisors are not. So whatever supposed "anomaly" might result relates to the inclusion of partsmen, not the exclusion of service advisors.

Moreover, unlike service advisors, partsmen may in fact service automobiles. As DoL recognized in 1966 (when Congress narrowed the exemption), partsmen, who generally stock and dispense parts, may also inspect cars to identify parts needing replacement, "use micrometers, calipers, fan-belt measures, and other devices to measure parts for interchangeability," physically modify parts for replacement, and repair and replace specific parts, "using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders." U.S. DEP'T OF LABOR, *Automobile Parts Countermen, in* OCCUPATIONAL OUTLOOK HANDBOOK, BULLETIN NO. 1450, at 312–13 (1966–67 ed.). Me-

chanics and sometimes partsmen service automobiles (and have the grease under their fingernails to prove it), while service advisors do not.

6. Petitioner insists that the conjunction "or" means that each noun must be paired with each verb—that salesmen, partsmen, and mechanics can each sell *or* service automobiles. Pet. 27–29. But that is not even a natural reading, let alone the only possible reading, of the text. As the court of appeals noted, any reader of the phrase "dogs or cats are barking or meowing" would understand that only dogs bark, while only cats meow. Pet. App. 14. A "natural reading of the [FLSA] text strongly suggests that Congress did not intend that both verb clauses [selling and servicing] would apply to all three subjects." Pet. App. 14. It is far more natural to understand that salesmen sell automobiles, as the words' shared etymology confirms. At the very least, the statute does not foreclose this natural reading.

7. Finally, the court of appeals briefly and correctly noted this Court's canon "that courts should construe the FLSA's [§ 213] exemptions narrowly" in favor of employees. Pet. App. 6 & n.3 (citing *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), in turn relying on *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959) (Harlan, J.)). Petitioner attacks this canon (at 32–33) while ignoring this Court's precedents establishing it. Such canons of construction are quintessential "traditional tools of statutory construction" required at step one of *Chevron*. 467 U.S. at 843 n.9; *accord City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in the judgment).

8. In short, at *Chevron* step one, the statute does not unambiguously exempt service advisors. If anything, the plain language of the statute compels the conclusion, reached by DoL and consistently stated in its regulations, that service advisors are *not* exempt from the FLSA's overtime requirement.

B. DoL Reasonably Declined to Expand the Statutory Exemption to Service Advisors

Even if the statute permitted petitioner's countertextual reading of the salesman/partsman/mechanic exemption, it would hardly compel it or make the contrary conclusion unreasonable. At *Chevron* step two, the court of appeals correctly upheld DoL's interpretation of § 213(b)(10)(A) as reasonable. The agency's view "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

1. Based on the text of the exemption and the comments it received during rulemaking, DoL's 2011 final rule reaffirmed the agency's original reading of the statute "as limiting the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. DoL agreed with comments that the exemption "'requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle '" *Id.* (quoting comment). DoL further agreed with other comments that "'neither integration with exempt employees nor the performance of functions related to those of exempt employees qualifies an

employee as one who is *primarily engaged in either selling or servicing vehicles*.'" *Id.* (quoting comment). As twelve leading Members of Congress commented, the exemption does not include "salesmen who sell services." *Id.*; George Miller et al., Comment Letter, at 7–8, http://tinyurl.com/qfrrfz9.

2. DoL also acted reasonably in 2011 in reaffirming its longstanding 1970 interpretive rule. Rather than changing its regulation in 1978 or 1987, DoL had indicated in nonbinding documents that it would decline to enforce this portion of the regulation, after some pre-*Chevron* decisions had (erroneously) determined that the agency's interpretation was not "the best." 76 Fed. Reg. at 18,838; *Brennan*, 475 F.2d at 1097. The purpose of the later notice-and-comment rulemaking was to take a closer, more comprehensive look at the issue.

Regardless, a change in its approach would be immaterial to the 2011 regulation's validity. Under *Chevron* step two, agencies are free to change their positions as long as they provide reasoned explanations for doing so. In *Brand X*, this Court clarified that "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." 545 U.S. at 983. After *Brand X*, DoL was not required to continue acquiescing in the Fifth Circuit's pre-*Chevron* reading of the statute. And contrary to petitioner's claim (at 17, 18, 33, 34), there is nothing "retroactive" about applying the 2011 legislative regulation to post-2011 conduct. *Long Island Care*, 551 U.S. at 170–71.

3. A service advisor's compensation by commission does not make him ineligible for overtime. *Con-*

tra Pet. 30–31. While the FLSA does "exclud[e] *certain* employees of retail or service establishments," Pet. 31 (emphasis added), it contains no blanket exemption from overtime pay for all commission-based employees. On the contrary, employees are exempt only if they fall within a statutory exemption. One such exemption is the salesman/partsman/mechanic exemption. Another such exemption requires that their employers show that they (a) work for a "retail or service establishment"; (b) receive more than 150% of the minimum hourly wage; and (c) receive more than half of their compensation as "commissions on goods or services" over a "representative period" of at least a month. 29 U.S.C. § 207(i). Commission-based employees who do not satisfy these requirements, such as those paid a percentage of regularly predictable sales with only a small increment for sales above their expected sales, are entitled to overtime pay. 29 C.F.R. § 779.416(c). And to qualify for enumerated exemptions such as § 207(i), employers must not only satisfy the statutory prerequisites, but also document them by keeping appropriate records. 29 C.F.R. § 515.16.

Nor does employers' "negotiated" compensation with employees, Pet. 3, 17, 30, 33, 34—in the sense of having hired employees on terms inconsistent with the FLSA—have any relevance. Employers cannot evade the overtime requirement by paying employees on a piecework or commission basis; unless employees fall within an enumerated exemption, they are entitled to overtime.

Rather than expanding § 213(b)(10)(A) to negate § 207(i)'s requirements and recordkeeping, DoL act-

ed reasonably in requiring employers to meet § 207(i)'s specific requirements for employees paid on commission.

III. THE QUESTION PRESENTED IS OF LIMITED SIGNIFICANCE, AS INDUSTRY COMMENTATORS ACKNOWLEDGE, AND THIS CASE IS A POOR VEHICLE FOR ADDRESSING IT

1. Any decision in this case would have limited effect. According to petitioner's amicus (at 7), service advisors may be exempt from overtime pay under a different FLSA exemption, § 207(i). As an industry website asserts, "[c]onsidering that most dealerships pay their service advisers using some sort of commission or flat-rate pay plan specifically designed to qualify the service adviser for the [§ 20]7(i) commissioned sales exemption, the *Navarro* decision likely affects very few, if any, employers." John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators after* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), http://tinyurl.com/qxpc3kj. As a law firm reassured its automobile dealership clients, the decision below need not occasion "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with Section 207(i)." Scali Law Firm, Navarro *Decision Should Have Little Effect on California Auto Dealers* (Mar. 29, 2015), http://tinyurl.com/ngvbceu.

Furthermore, only four federal court of appeals or state supreme court precedents have addressed this issue over the last forty-five years, and only one (the decision below) has done so since the 2011 legis-

lative regulation. The paucity of precedent underscores that the questions presented are hardly ones of national concern.

2. Moreover, the skeletal record makes this case a poor vehicle. The district court granted petitioner's motion to dismiss before any discovery took place. This Court would thus lack concrete evidence contextualizing service advisors' roles and responsibilities within a particular auto dealership.

3. Finally, petitioner's dire predictions about forum-shopping and nationwide FLSA collective actions are unwarranted. *Contra* Pet. 18, 22, 35. FLSA plaintiffs in collective actions must not only affirmatively opt in, but also bear the burden of proving that they are "similarly situated." 29 U.S.C. § 216(b). District courts within the Ninth Circuit enforce this burden rigorously, decertifying plaintiffs' classes unless they can "provide[] substantial evidence that their claims arise out of a single policy, custom, or practice that led to FLSA violations." *Beauperthuy* v. *24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1118, 1122 (N.D. Cal. 2011) (collecting citations); *accord Reed* v. *Cty. of Orange*, 266 F.R.D. 446, 449–50 (C.D. Cal. 2010). Because automobile dealerships are often autonomous and the industry is splintered, collective actions are unlikely to remain certified. *See Brewer* v. *Gen. Nutrition Corp.*, No. 11–CV–3587, 2014 U.S. Dist. LEXIS 159380, at *54 (N.D. Cal. Nov. 12, 2014) ("[E]mployees are not similarly situated in that they are required to work unpaid overtime, if at all, as a result of individual managers' decisions as opposed to a single corporate policy.").

This obstacle is compounded by the possibility that defendants may raise § 207(i) as an affirmative defense to collective action certification. Section 207(i) "is a highly individualized defense because its application requires week-by-week and other periodic calculations specific to each individual Plaintiff and his or her particular circumstances." *Beauperthuy*, 772 F. Supp. 2d at 1126 (internal quotation marks omitted); *accord id.* at 1132–33. "The need for such individualized inquiries would make proceeding by representative testimony impracticable," even against a single nationwide corporate defendant. *Id.* at 1127–28. Thus, district courts within the Ninth Circuit have decertified FLSA collective actions that may implicate § 207(i). *Id.* at 1134–35. Petitioner cites no contrary evidence of a rush to file or transfer FLSA suits into the courts below. Petitioner's floodgates fears are groundless.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

KEVEN STEINBERG
THOMPSON, COE AND
O'MEARA
12100 WILSHIRE BLVD.
SUITE 1200
LOS ANGELES, CA
90025
(310) 954–2362

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746–2297
SBIBAS@LAW.UPENN.EDU

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In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P. CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

December 22, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

For more than forty years, federal and state courts have uniformly held that service advisors are exempt from the FLSA's overtime-pay requirements because they are "salesm[e]n ... engaged in ... servicing automobiles." 29 U.S.C. §213(b)(10)(A); *Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion*, 294 P.3d 397 (Mont. 2013). Those courts have also uniformly refused to defer to the narrow and counter-textual interpretation of §213(b)(10)(A) advanced by the Department of Labor ("DOL"). In the decision below, however, the Ninth Circuit departed from that unbroken line of authority, holding that DOL's interpretation was entitled to controlling deference and that service advisors were not exempt. The court acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11.

Respondents nonetheless deny the existence of a circuit split, arguing that the unbroken line of precedent finding service advisors exempt under §213(b)(10)(A) was somehow washed away by DOL's promulgation of a "new" regulation in 2011. But that regulation was not "new" at all. As Respondents concede, DOL simply adhered to its old position. *See* BIO.24 (DOL "reaffirm[ed]" the agency's "longstanding 1970 interpretive rule"). When an agency considers changing course after losing in multiple circuits, but ultimately decides to stay the course and adhere to its rejected position, it does not magically sweep away the adverse precedent and start

anew with a clean slate. To the contrary, when an agency declines to acquiesce in the face of adverse circuit precedent and then convinces another circuit to adopt its view, the issue becomes ripe for this Court's review.

Respondents' defense of the Ninth Circuit's decision on the merits fares no better. The disjunctive language of §213(b)(10)(A) exempts "any salesman" engaged in "selling *or servicing* automobiles." Yet Respondents—like the Ninth Circuit—would simply read the latter portion of the phrase out of the statute. Every other court to consider this issue has correctly recognized that a service advisor is a paradigmatic example of a "salesman ... engaged in ... servicing automobiles."

Finally, Respondents' attempt to minimize the importance of this issue is unavailing. As amici note, the decision below has serious practical implications for the nearly 50,000 service advisors at more than 18,000 dealerships nationwide. And the issue was important enough for Congress to provide an exemption directly focused on dealerships. The fact that service advisors might potentially be covered by different, less specific, and more burdensome exemptions to the FLSA is no reason to tolerate an ongoing circuit split over the meaning of §213(b)(10)(A). And Respondents blink reality by pointing to the relative paucity of recent reported cases on this issue as a reason to deny certiorari. The obvious reason for that absence of cases is the complete absence of any case law supporting the interpretation of §213(b)(10)(A) embraced by the Ninth Circuit here. If the decision below is left

undisturbed, there will be no shortage of lawsuits seeking windfall recoveries. The Ninth Circuit's decision dramatically upsets that once-settled body of precedent, and this Court's intervention is warranted to restore uniformity to this important area of the law.

I. The Ninth Circuit's Decision Conflicts With The Decisions Of Several Other Courts.

Federal and state courts have uniformly held for decades that service advisors are exempt under §213(b)(10)(A) because they are "salesm[e]n ... primarily engaged in ... servicing automobiles." *See* Pet.18-23; *Walton*, 370 F.3d 446; *Brennan*, 475 F.2d 1095; *Thompson*, 294 P.3d 397 The Ninth Circuit candidly acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11. Respondents (at 9-15) nonetheless deny the existence of a split, but their arguments are wholly without merit.

A. Respondents' principal submission is that there is no circuit split because DOL's 2011 regulation was a watershed event that called into question the earlier decisions interpreting §213(b)(10)(A). Because the cases that conflict with the decision below "arose before 2011," Respondents contend (at 10-15) that there is no current split of authority that warrants this Court's intervention.

But, as Respondents concede (at 24), DOL's 2011 regulation simply "reaffirm[ed] its longstanding 1970 interpretive rule." Indeed, after actively considering acquiescing in the wall of adverse decisions, DOL expressly "*decided not to adopt*" a "proposed change" to its interpretive regulation. 76 Fed. Reg. 18,832,

18,838 (2011) (emphasis added). DOL ultimately declined to acquiesce and stuck by the very same counter-textual interpretation of §213(b)(10)(A) advanced in the 1970 regulation and rejected by every court to consider it. But having adhered to its earlier position, DOL did not somehow wipe the slate clean.

Respondents do not cite a single case suggesting that an agency's re-promulgation of a rule in nearly identical form—based on the *same rationale* as the original rule—can wipe out adverse precedent. If DOL wanted to eliminate the possibility of a circuit split, it could have acquiesced in the adverse decisions. With DOL having done the opposite, and the Ninth Circuit then adopting DOL's minority position, the stage is now set for this Court's review.

In all events, the 2011 regulation did not—and could not—change the text of §213(b)(10)(A), which was the basis for the lower courts' rejection of DOL's position. The Fourth Circuit rejected DOL's "impermissibly restrictive construction of the statute," and found DOL's regulatory definition "flatly contrary to the statutory text." *Walton*, 370 F.3d at 451-52. And the Montana Supreme Court similarly held that service advisors were exempt under a "plain, grammatical reading" of the exemption because they are "salesmen ... primarily engaged in ... servicing automobiles." *Thompson*, 294 P.3d at 402. Those decisions were grounded in the unambiguous text of §213(b)(10)(A), which DOL has no power to change—through a "new" regulation or otherwise.

B. Respondents further contend (at 13-14) that the many decisions finding service advisors exempt are no longer good law in light of *Long Island Care v.*

Coke, 551 U.S. 158 (2007), and *Mayo Foundation v. United States*, 562 U.S. 44 (2011). But *Long Island* and *Mayo* simply clarified that the *Chevron* framework applies to interpretive regulations, including those promulgated under the FLSA. *See Long Island*, 551 U.S. at 171-72; *Mayo*, 562 U.S. at 52-58. That holding had no effect on the decisions finding service advisors exempt under §213(b)(10)(A).

In *Walton*, for example, the Fourth Circuit gave DOL's position "considerable weight" and would have upheld that rule if it had "implement[ed] the congressional mandate in a reasonable manner." 370 F.3d at 452. *Chevron*, *Long Island*, and *Mayo* provide no greater deference than that. *See Chevron v. NRDC*, 467 U.S. 837, 844 (1984) (court must defer to a "reasonable interpretation made by the administrator of an agency"); *Long Island*, 551 U.S. at 173 (agency action should be upheld if it "falls within the statutory grant of authority" and "is reasonable"). The Fourth Circuit ultimately refused to defer to DOL's interpretation because it was an unreasonable interpretation of the statute. Neither *Mayo* nor *Long Island* requires acceptance of an unreasonable agency interpretation.

Respondents' assertion (at 14-15) that the Montana Supreme Court's post-*Mayo* and post-*Long Island* decision in *Thompson* is no longer good law is even weaker. Respondents conveniently ignore that the *Thompson* decision not only post-dated *Long Island* but actually *cited* and *applied* it. As the court explained, the plaintiff's "reliance on *Chevron* and *Long Island* is unavailing because those cases involved regulations that defined statutory terms *in a*

way that did not conflict with the controlling statute." *Thompson*, 294 P.3d at 402 (emphasis added). The Montana Supreme Court faithfully applied the two-step *Chevron* framework and concluded at step one that DOL's counter-textual interpretation was not entitled to deference.[1]

In sum, although the Ninth Circuit badly misconstrued the text of §213(b)(10)(A), *see infra*, the court was exactly right to acknowledge that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," Pet.App.11.

II. Respondents' Defense Of The Ninth Circuit's Reasoning Fails.

It is not surprising that the Ninth Circuit's decision is an outlier, as that decision rested on an untenable interpretation of §213(b)(10)(A). Pet.23-33. The FLSA exempts from the overtime requirements "any salesman ... primarily engaged in selling or servicing automobiles." Either gerund—"selling" or "servicing"—can sensibly be applied to the noun "salesman." Because a service advisor is the paradigmatic "salesman ... engaged in ... servicing automobiles," that should be the end of the inquiry under *Chevron*.

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[1] Respondents suggest (at 15-17) that Petitioners are seeking "less than full *Chevron* deference" for DOL's regulations. That is incorrect. Petitioners argued that DOL's position is not entitled to deference under *any* relevant standard (*Chevron* or otherwise) because it is contrary to the text of §213(b)(10)(A) or, at a minimum, is an unreasonable interpretation of the statute. Pet.23-33.

Respondents nonetheless assert (at 17-18) that Congress' failure to use the specific term "service advisors" in the statutory text is somehow dispositive under the canon *expressio unius est exclusio alterius*. But there was no need for Congress to include the narrower term "service advisors" because it expressly included the umbrella term "*any salesman* ... engaged in selling or servicing automobiles." Respondents do not dispute that service advisors are salesmen who sell services. *See* BIO.18 ("a salesman is one who sells something, making a sale").

Respondents also attempt to rewrite the statute by adding restrictive modifiers that appear nowhere in the text. On multiple occasions, Respondents casually describe §213(b)(10)(A) as exempting "car salesmen" (at 1) or "automobile salesmen" (at 9, 16). Respondents might wish that the statute were limited to "car salesmen," but the exemption contains no such limitation. Rather, the FLSA exempts "any salesman ... engaged in ... selling *or servicing* automobiles." §213(b)(10)(A) (emphasis added).[2]

The Ninth Circuit acknowledged that "[s]ervice advisors may be 'salesmen' in a generic sense," but found them to be non-exempt because they "do not *personally* sell cars and they do not *personally* service cars." Pet.App.13 (emphasis added). But, as Petitioner explained, nothing in the statute requires that a salesman, mechanic, or partsman be *personally*

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[2] Respondents (at 18-19) offer examples of salesmen who are not exempt. But, unlike service advisors, salesmen who sell warranties, underbody coatings, or insurance are not primarily engaged in either selling automobiles or servicing them.

involved in servicing in order to be exempt. *See* Pet.25-26.

Respondents (at 20) now backtrack from the Ninth Circuit's view, asserting that DOL has never imposed a requirement of personal involvement. But abandoning the reasoning of the only court ever to side with DOL is a dangerous business, because without injecting the requirement of personal involvement, DOL's counter-textual interpretation cannot be saved. Of course, by adding that requirement to the statutory text, the Ninth Circuit created a significant anomaly with respect to "partsmen," who are expressly included in the statute yet are not *personally* engaged in either selling or servicing automobiles. The Ninth Circuit's interpretation would thus write partsmen out of the statute altogether. Pet.25-27 Respondents insist (at 21-22) that there may be a partsman or two who also personally service automobiles. But no one, including DOL, seriously believes that Congress was trying to exempt that rara avis, while leaving the vast majority of true partsmen non-exempt. *See* 29 C.F.R. §779.372(c)(2) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). Congress' inclusion of partsmen in §213(b)(10)(A) thus destroys the reasoning of the only court to adopt DOL's view.

Respondents (at 22) reprise the Ninth Circuit's stylized analogy about a reference to "barking or meowing" "dogs or cats." But that analogy—and its companion involving "eating or drinking" pets—merely illustrates that statutory context matters. *See* Pet.27-29. Here, the statutory context makes clear

that a service advisor is a salesman primarily engaged in servicing automobiles. And Respondents have no response to the fact that the inclusion of partsmen in the exemption conclusively demonstrates that Congress could not have intended a one-to-one mapping of nouns to gerunds in §213(b)(10)(A). Pet.28-29.

Treating service advisors as non-exempt also makes little sense in the context of the broader FLSA regulatory scheme. Pet.30-31. Numerous provisions of the FLSA recognize that it is both common and reasonable for salesmen to be compensated based on their *success at selling* rather than the sheer number of hours worked. *See, e.g.*, 29 U.S.C. §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman"); *Brennan*, 475 F.2d at 1097 (salesmen "are more concerned with their total work product than with the hours performed."). Respondents do not even attempt to argue that forcing service advisors into an ill-fitting hourly compensation regime would advance the policy goals underlying the FLSA. Indeed, as amici note, service advisors in several states within the Ninth Circuit earn an average of $75,769 per year, and the top 10% earn on average $105,583. NADA Br. 7. This is not a case that implicates the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life," S. Rep. No. 81-640 at 3 (1949).

Finally, Respondents (at 22) turn to "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995)—the anti-employer canon that exemptions to the FLSA should be construed "narrowly." That purported canon has

no basis in this Court's modern jurisprudence, and in recent years the Court has typically cited it only in the course of *declining* to apply it. *See, e.g., Sandifer v. U.S. Steel*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2172 n.21 (2012) (canon does not apply to FLSA's definitions). The Ninth Circuit's reliance on that questionable rule only underscores the tenuous nature of its holding. The FLSA and its exemptions should be construed neither narrowly nor broadly, but fairly and correctly.[3]

III. This Case Is An Ideal Vehicle To Address The Scope Of §213(b)(10)(A).

This case presents an excellent vehicle for this Court to resolve an acknowledged circuit split over whether tens of thousands of "service advisors" who work at car and truck dealerships are exempt from the FLSA's overtime-pay requirements. Respondents seek to impose significant FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. This Court has repeatedly rejected such attempts, *see, e.g., Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513

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[3] Respondents suggest (at 9) that exempting service advisors would "reenact the blanket automobile dealership exemption that Congress repealed in 1966." But the blanket exemption covered *everyone* working at a dealership, including typically non-exempt employees such as porters, cashiers, and janitors. *See* Pub. L. No. 87-30, §9, 75 Stat. 65 (1961). Those employees—who are neither salesmen, partsmen, nor mechanics—will be unaffected by the Court's decision in this case.

(2014); *Christopher*, 132 S. Ct. 2156, and should do so again here.

As amici explain, there are more than 18,000 franchised car dealerships nationwide, which collectively employ an estimated 45,000 service advisors. *See* NADA Br.6. Those dealerships and their employees have negotiated mutually beneficial compensation plans in good-faith reliance on the unbroken line of authority finding service advisors to be exempt. The Ninth Circuit's decision will require dealerships and their employees to rework their longstanding relationships in ways that will be harmful to both and will do nothing to advance the purposes of the FLSA.

Respondents (at 26-27) make the curious assertion that this issue is of limited importance because there have been few recent cases addressing whether service advisors are exempt. But there is actually a very good explanation for this "paucity of precedent": plaintiffs have had no reason to bring such cases because, for more than forty years, *every court to consider the issue* had found service advisors to be exempt. But now that one particularly ambitious plaintiff has procured a deviating circuit precedent—by the most populous circuit, no less—there will be no lack of plaintiffs willing to seek windfall recoveries for employees who were compensated pursuant to industry custom and previously uniform precedent.

Respondents further contend (at 26) that this Court's review is unnecessary because service advisors might also fall within the more general exemption for commissioned employees under §207(*i*). But the potential availability of a different—less

specific and more burdensome, *see* NADA Br.7-8, 12—exemption cannot justify ongoing disuniformity over the scope of §213(b)(10)(A). Indeed, in *Christopher*, this Court granted certiorari to address a circuit split over the scope of the "outside sales" exemption even though the employees in question were potentially covered by another exemption. *See* Br. for United States at 16 n.3, *Christopher v. SmithKline Beecham*, No. 11-204 (Feb. 6, 2012). Congress deemed the treatment of certain dealership employees sufficiently important to provide a specific exemption for them. This Court should not allow the Ninth Circuit to render that provision a dead letter for service advisors merely because they might be covered by another, more general exemption as well.[4]

Finally, Respondents assert (at 27) that this case is a poor vehicle because discovery is needed regarding "service advisors' roles and responsibilities." But Respondents' complaint precisely articulates the "roles and responsibilities" they assumed at the dealership. Respondents do not identify any other facts or evidence that would be needed to shed light on the relevant issues. This Court—like the district court and the Ninth Circuit—need only resolve the pure legal question of whether §213(b)(10)(A) means what it says when it exempts "any salesman ... primarily engaged in ... servicing automobiles." The Court should grant certiorari to make clear that service

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[4] Respondents (at 27) also offer vague assurances about the limits on FLSA collective actions. *Christopher* and *Integrity Staffing* were also FLSA collective actions, yet the limitations on such cases did not prevent this Court from granting certiorari to resolve circuit splits.

advisors nationwide are covered by the exemption's plain language.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P. CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

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On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 WESTPARK DRIVE
MCLEAN, VA 22102
(703) 821-7000

FELICIA R. REID
Counsel of Record
HIRSCHFELD KRAEMER LLP
505 MONTGOMERY STREET
SUITE 1300
SAN FRANCISCO, CA 94111
(415) 835-9000
freid@hkemploymentlaw.com

Counsel for Amici Curiae National and State Automobile Dealers Associations

QUESTION PRESENTED

Whether "service advisors" at car and truck dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the overtime pay requirements of the Fair Labor Standards Act, which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state automobile dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for Petitioner received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Counsel of record for Respondent received notice nine days prior the due date. Respondent has already obtained an extension for responding to the petition through and including December 5, 2015, and Respondent's counsel consents to the filing of this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

franchised new car and truck dealers nationwide. Its members sell new cars and trucks and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. As of October 2015, there were approximately 18,000 franchised motor vehicle dealerships in the United States. Of those, approximately 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a non-profit trade organization, incorporated in its respective state, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,500 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new cars

and trucks and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of substantial significance to amici and their members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on franchised new motor vehicle dealers not only in the states comprising the Ninth Circuit, but also nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have depended for more than 40 years in structuring their compensation plans.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's automobile dealerships have relied on the FLSA's overtime exemption for "any salesman primarily engaged in selling or servicing automobiles or trucks" in section 13(b)(10) of Fair Labor Standards Act (FLSA) in classifying and compensating their Service Advisors.[2] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based primarily on sales rather than on the number of hours they work. This has benefitted not only dealerships but employees as well, for Service Advisors are generally well compensated.

Dealerships have relied not only on the statutory language of the exemption in structuring their compensation programs but, as important, on a solid wall of judicial authority interpreting the exemption's scope. Until the Ninth Circuit's decision in this case, every federal and state court interpreting the exemption, including several circuit courts of appeals, had ruled that it encompassed Service Advisors.

The Ninth Circuit's decision rejecting the applicability of the exemption to these well

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[2] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Manager, among other titles.

compensated employees is an outlier, threatening to disrupt what has until now been a settled, widely accepted compensation practice in the nation's car and truck dealerships.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs one or more Service Advisors. An estimated 45,000 Service Advisors work in dealerships across the United States. They are generally classified as exempt employees, often under section 13(b)(10). The Ninth Circuit's decision creates significant uncertainty about the validity of the exemption, raising the specter of unanticipated liability for past pay practices and disruptions to dealerships and employees alike if Service Advisors' incentive-based compensation must be restructured to avoid that liability going forward.

Certiorari is clearly warranted to resolve the circuit split on this issue and to clarify the scope of this key exemption for the nation's car and truck dealerships.

ARGUMENT

I. Service Advisors Are Key Contributors To The Revenues of Franchised Automobile Dealerships And Have Always Been Classified As Exempt Employees

There are approximately 18,000 franchised automobile dealerships in the United States, the great majority of which are represented by amici. More than 2,500 of these dealerships are located the nine states encompassing the Ninth Circuit. Many dealerships have multiple locations, some across several states. Nationally, franchised dealerships employ nearly 1.1 million people and have a combined annual payroll of $60 billion. The overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised automobile dealership in the country has a service department. Service departments provide expert vehicle maintenance and repair services to dealership customers, and are a key revenue profit center for dealerships. No position is more crucial to this function than the position of the Service Advisor. Service Advisors provide advice and counsel to customers, selling service, maintenance and repairs through these important customer relationships. NADA estimates that 45,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2014 the average annual compensation for Service Advisors

nationwide was $65,876, with the top 10% earning on average more than $99,164 per year.[3] Compensation levels are significantly higher in NADA's Pacific Region (Alaska, California, Hawaii, Oregon and Washington), where the annual average is $75,769, and the top 10% earn on average $105,583 per year.[4]

Service Advisors are typically classified as exempt from overtime, frequently based on the FLSA's section 13(b)(10), which exempts "salesmen primarily engaged in selling or servicing automobiles or trucks."[5] Alternatively, Service Advisors may also be exempt from overtime under the FLSA's section 7(i) exemption. The 7(i) exemption applies to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation.[6] The 7(i) exemption is administratively more complex, requiring the tracking of actual work hours and a specific compensation structure comprised primarily of commissions, in contrast to the simplicity of the 13(b)(10) exemption, which does not depend on how or how much a Service Advisor is paid. Importantly, the 7(i) exemption can operate to the disadvantage of the Service Advisor, for it requires the majority of

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[3] National Automobile Dealers Assn. *et al.*, *2015 Industry Report: Dealership Workforce Study* (NADA 2014) at 13, 84.

[4] *Id.* at 80, 82.

[5] 29 U.S.C. § 213(b)(10).

[6] 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038 (9th Cir. 2005).

compensation to be in the form commissions which are inherently at risk and subject to variations. The 13(b)(10) exemption, on the other hand, provides the flexibility for a generous and predictable base wage with the option for incentive pay as an upside to sales productivity.

II. More Than Three Decades Of Jurisprudence and Agency Interpretation Confirm That Service Advisors Qualify for the 13(b)(10) Exemption.

Because of the importance of the 13(b)(10) exemption to franchised dealership businesses, over the years, amici have closely tracked the judicial decisions and agency guidance addressing the exemption in order to advise their members on their wage and hour compliance obligations with respect to Service Advisors. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[7] and up until the Ninth Circuit's decision in this case, the decisions of federal circuit courts,[8] federal district courts,[9] and state courts[10]

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[7] 475 F.2d 1095 (5th Cir. 1973).

[8] *Deel Motors*, 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[9] *Clark & Day v. Palmen Motors*, No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.* (6th Cir. 1976).

have uniformly held that Service Advisors are encompassed within the exemption.

In 1978, the U.S. Department of Labor (DOL) followed suit and adopted that view as well, rescinding previous guidance and issuing an Administrator Opinion squarely holding that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are exempt when the majority of their sales in dollar volume is for non-warranty work.[11] In 1987, the DOL revised its enforcement bible, the Wage & Hour Field Operations Handbook (FOH), to reflect that opinion and the case law on which it was based.[12] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" in accordance with this widely accepted interpretation, including the provision explicitly excluding service managers from the exemption, subsection (c)(4). That point came in 2008, when the DOL proposed regulations to formally codify its consistent interpretation of the exemption over the previous three decades to include Service Advisors.[13]

(footnote cont. for previous page)

[10] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont. 2013).

[11] Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

[12] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[13] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

III. Recent Developments under Section 13(b)(10) Have Left Intact The Inclusion of Service Advisors in the Exemption.

In 2011, the DOL issued a final rule reflecting its current interpretation of the 13(b)(10) exemption, 29 C.F.R. § 779.372. The Final Rule rescinded subsection (c)(4) of the previous regulation, which had explicitly excluded Service Advisors from the exemption, consistent with the DOL's proposed 2008 interpretive regulation. The DOL, however, chose not to revise the remainder of the interpretive regulation in accord with its 2008 proposal, in doing so declining to explicitly clarify that the exemption encompassed Service Advisors. In explanatory remarks, the DOL stated that "there are circumstances under which the requirements for the exemption would not be met" by Service Advisors.[14]

Congress reacted swiftly and definitively to the DOL's about-face. Noting the Final Rule's impact on small businesses and expressing its profound disagreement with the action, Congress attached a limitation rider to appropriations bills for 2012 and 2013 barring the DOL from enforcing its regulatory changes with respect to Service Advisors.[15] Those actions were in accord with Congress' 1974 action implicitly approving the seminal 1973 *Deel* decision as to the scope of the exemption, when it amended section 13(b)(10) but

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[14] 76 Fed. Reg. 18832 (April 5, 2011).

[15] Consolidated Appropriations Act of 2012, Pub.L. No. 112-74, Div. F § 113, 125 Stat. 786; Joint Resolution, Continuing Appropriations 2013, Pub.L. No. 112-175, 126 Stat. 1313.

saw no need to revise it to express disagreement with *Deel*.[16]

Notably, the DOL has not revised its Field Operations Handbook to exclude Service Advisors from the scope of the exemption, nor has it formally rescinded its 1978 Opinion Letter approving the application of the exemption to Service Advisors.

To summarize, until the Ninth Circuit's decision, a uniform body of judicial decisions over a period of more than 40 years held that Service Advisors are exempt under section 13(b)(10). For more than three decades, the DOL embraced those decisions and adopted that interpretation of the exemption as well. The DOL's equivocal attempt in 2011 to call its previous interpretations of the exemption into question has been roundly rejected by Congress, consistent with its historical implicit approval of the application of the section 13(b)(10) exemption to Service Advisors. The Ninth Circuit's decision rejecting this interpretation at best raises serious concerns on the merits, at worst is simply wrong.

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[16] See, e.g., *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (when Congress amends a statute that has been subject to prior judicial interpretation, its failure to respond to that interpretation in the amendment "is itself evidence that Congress affirmatively intended to preserve the interpretation.").

IV. The Ninth Circuit Decision Creates Unanticipated Liabilities, Future Uncertainties, and Significant Burdens For The Nation's Automobile Dealerships.

Given the substantially consistent interpretation of the exemption described above, since at least 1978, NADA and other amici have advised their members that Service Advisors are encompassed within the FLSA's 13(b)(10) exemption. Amici's members and other car dealerships have relied on that advice for more than three decades in classifying Service Advisors as exempt from overtime, structuring their compensation and recordkeeping practices accordingly. The Ninth Circuit's decision threatens to upend these longstanding understandings, not only for dealerships in the Ninth Circuit but for other dealerships across the entire United States, creating potential unanticipated liability and confusion. Its impact in the real world of brick-and-mortar automobile dealerships cannot be overstated.

The impact of the decision will be felt most immediately by dealerships within the Ninth Circuit. There are more than 2,500 dealerships in the nine states located within the Circuit. As a result of the Ninth Circuit's decision, dealerships that have relied solely on the 13(b)(10) exemption in classifying their Service Advisors now face unanticipated overtime liability. In making the exemption unavailable, the decision puts dealerships that have relied on this exemption, rather than the 7(i) exemption, at risk for private FLSA back pay claims. To address future liability, these

dealerships will have come into the compliance with this new interpretation. It is highly unlikely, however, that dealerships will reclassify Service Advisors as non-exempt. Instead, they will look to the 7(i) exemption, which could entail reconfiguring their compensation plans to put more of their Service Advisors' compensation into commissions and instituting the extra recordkeeping required to qualify for that exemption. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent. Commissions, of course, carry both an upside advantage and a downside risk for employees. The downside risk is that in leaner economic times when commission earnings fall, the only compensation guarantee under the 7(i) exemption is 1.5 times the minimum wage, whereas the base salary of Service Advisors whose exemption does not depend on section 7(i) is typically far higher. The Ninth Circuit's decision, if allowed to stand, therefore, is unlikely to benefit Service Advisors in any way.

There is a subgroup of dealerships in the Ninth Circuit states for which the impact will be even more onerous: those dealerships that individually operate stores both inside and outside the Ninth Circuit. NADA's membership data indicates that these multi-Circuit dealers operate a total of 1,444 stores, 517 of which are within the Ninth Circuit and 927 outside of it. These numbers are just the tip of the iceberg, given the limitations of NADA's ability to identify smaller groups of commonly owned, inter-circuit dealerships with centralized ownership, payroll and human resources

functions, which fall into this category as well. These multi-circuit dealerships face greater hurdles in establishing uniform payroll and compensation practices, which will now have to make distinctions in how Service Advisors are compensated based on whether they work in a Ninth Circuit state or not.

But the impacts of this outlier decision will be felt far beyond the Ninth Circuit, where it has already created substantial uncertainty, reopening an issue that had long since been considered settled and encouraging more litigation over the exemption. Many dealerships outside the Ninth Circuit may proactively choose to restructure compensation and recordkeeping to meet the 7(i) exemption, which as discussed above may well be to the disadvantage of all involved. There will be no winners.

V The Petition for Certiorari Should Be Granted Because The Decision Creates a Conflict with Every Other Circuit as to the Scope of the Section 13(b)(10) Exemption.

Given the foregoing merits issues and negative impact on automobile dealerships, the petition should be granted to resolve a conflict among the circuits on an important matter.

Only the grant of certiorari and resolution by this Court can avoid the inequity that a circuit conflict creates, because until then, the parties' rights and duties depend upon where a case is litigated. Left unresolved, circuit conflicts feed on themselves, generating additional litigation in the other circuits.

The Ninth Circuit's decision conflicts with the decisions of all of the circuits that have considered the applicability of the section 13(b)(10) exemption to service providers: the Fifth Circuit's decision in *Brennan v. Deel Motors, Inc.*,[17] the Fourth Circuit's decision in *Walton v. Greenbrier Ford, Inc.*,[18] and the Eleventh Circuit's adoption of the *Deel Motors* decision pursuant to *Bonner v. City of Prichard.*[19] It also conflicts with the numerous federal district and state appellate court decisions in these and other circuits, including the Montana Supreme Court's *Thompson v. J.C. Billion*[20] decision. Indeed, the Ninth Circuit decision stands alone in holding that Service Advisors are not encompassed within the section 13(b)(10) exemption as a matter of law

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[17] 475 F.2d 1095.

[18] 370 F.3d, 446 (4th Cir. 2004).

[19] 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decision prior to 9/30/81 as controlling precedent).

[20] 368 Mont. 299.

CONCLUSION

The Ninth Circuit's decision creates a conflict with every other circuit to have addressed the section 13(b)(10) exemption for Service Advisors. Given the national scope of the issue, and the many inequities and disruptions resulting from the circuit conflict, certiorari is both appropriate and necessary. Amici curiae urge the Court to grant Petitioner Encino Motorcars' Petition for Certiorari.

Respectfully submitted,

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE
DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
(703) 821-7000

FELICIA R. REID
Counsel for Record
HIRSCHFELD
KRAEMER LLP
505 Montgomery Street
Suite 1300
San Francisco, CA 94111
(415) 835-9000
freid@hkemployment law.com

Attorneys for Amici Curiae National and State Automobile Dealers Associations

FEB 29

No. 15-415

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(215) 746–2297
sbibas@law.upenn.edu

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

February 29, 2016

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Petition for Writ of Certiorari Granted January 15, 2016

KEVEN STEINBERG
THOMPSON, COE AND O'MEARA
12100 WILSHIRE BLVD.
SUITE 1200
LOS ANGELES, CA 90025
(310) 954–2362

Counsel for Respondents

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P. CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

Counsel for Petitioner

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Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, Reuben Castro v. Mercedes Benz of Encino, (C.D. Cal. #2:12-cv-08051-RGK-MRW), Complaint JA-37

The following opinions, orders, and statutory and regulatory provisions have been omitted from this Joint Appendix because they appear on the listed pages in the appendix to the Petition for Certiorari:

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, *Hector Navarro; Anthony Pinkins; Kevin Malone; and Reuben Castro v. Encino Motorcars, LLC*, No. 13-55323 (Mar. 24, 2015)..... App-1

Appendix B

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc, *Hector Navarro, et al. v. Encino Motorcars, LLC*, No. 13-55323 (June 1, 2015) App-20

Appendix C

(In Chambers) Order Re: Defendant's Motion to Dismiss of the United States District Court for the Central District of California, *Navarro, et al. v. Mercedes Benz of Encino*, No. 2:12-cv-08051-RGK-MRW (Jan. 25, 2013) App-22

Appendix D

29 U.S.C. §213 ..... App-33

Appendix E

29 C.F.R. §779.372 ..... App-58

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; REUBEN CASTRO

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO

DOCKET ENTRIES

Date Filed	#	Docket Text
02/26/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 03/05/2013. Transcript ordered by 03/27/2013. Transcript due 06/25/2013. Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins opening brief due 08/05/2013. Appellee Encino Motorcars, LLC answering brief due 09/04/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. [8526738] (BG) [Entered: 02/26/2013 10:26 AM]

Date Filed	#	Docket Text
02/26/2013	2	Filed representation notice of S. Keven Steinberg for Appellants. Served on 02/25/2013. [8526758] (BG) [Entered: 02/26/2013 10:33 AM]
03/01/2013	3	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins Mediation Questionnaire. Date of service: 03/01/2013. [8534359] (Steinberg, S.) [Entered: 03/01/2013 06:28PM]
03/05/2013	4	Filed (ECF) Appellee Encino Motorcars, LLC Mediation Questionnaire. Date of service: 03/05/2013. [8537663] (Scherwin, Todd) [Entered: 03/05/2013 02:21 PM]
06/13/2013	5	Filed order MEDIATION (BS): The Mediation Program of the Ninth Circuit Court of Appeals facilitates settlement while appeals are pending. See Fed. R. App. P 33 and Ninth Cir. R. 33-1. The court has scheduled a telephone settlement assessment conference, with counsel only, on June 25, 2013, at 10:00 a.m. PACIFIC (San Francisco) Time to discuss whether this case is appropriate for participation in the

Date Filed	#	Docket Text
		Mediation Program. The Circuit Mediator will initiate the conference call by contacting each person on the attached list of participants at the telephone number listed. Please be available for the call at least five minutes before the scheduled time. Counsel should review the attached list and inform Mediation Assistant Beatriz Smith by email (Beatriz_Smith@ca9.uscourts.gov) of any corrections to the list. Please notify Circuit Mediator Margaret Corrigan immediately by email (Margaret_Corrigan@ca9.uscourts.gov) if the dispute is settled, the appeal is dismissed or if counsel has an unavoidable scheduling conflict. Please copy all counsel on any such communications. All discussions that take place in the context of the assessment conference are strictly confidential. For more detailed information about the assessment conference, confidentiality, the Mediation Program and its procedures generally, please see the attachment to this order and the

Date Filed	#	Docket Text
		Mediation Program web site: www.ca9.uscourts.gov/mediation. [8666198] (BJB) [Entered: 06/13/2013 10:06 AM]
06/26/2013	6	Filed order MEDIATION (MAC): On June 25, 2013, a telephone conference was held with Circuit Mediator Margaret A. Corrigan. S. Keven Steinberg, Esq. participated on behalf of appellants; Todd Scherwin, Esq. participated on behalf of appellee. The court has determined that this appeal will not be selected for inclusion in the Mediation Program. All further inquiries regarding this appeal, including requests for extensions of time, should be directed to the Clerk's office. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions while the appeal is pending. [8682356] (BJB) [Entered: 06/26/2013 12:28 PM]
07/26/2013	7	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony

Date Filed	#	Docket Text
		Pinkins. New requested due date is 09/04/2013 at 04:00 pm. [8720264] (Steinberg, S.) [Entered: 07/26/2013 04:51 PM]
07/29/2013	8	Streamlined request by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins to extend time to file the brief is approved. Amended briefing schedule: Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins opening brief due 09/04/2013. Appellee Encino Motorcars, LLC answering brief due 10/04/2013. The optional reply brief is due 14 days from the date of service of the answering brief. [8720830] (LW) [Entered: 07/29/2013 09:59AM]
07/30/2013	9	Form 13 streamlined request by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins to extend time to file the brief is not approved because it is unnecessary. The streamlined request was approved 7/29/13. [8723098] (LW) [Entered: 07/30/2013 12:54 PM]

Date Filed	#	Docket Text
09/03/2013	10	Submitted (ECF) Opening Brief and excerpts of record for review Submitted by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins. Date of service: 09/03/2013. [8766211]-[COURT UPDATE: Attached corrected brief and excerpts. Resent NDA. 09/06/2013 by RY] (Steinberg, S.) [Entered: 09/03/2013 01:56PM]
***		
09/16/2013	13	Filed Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins paper copies of excerpts of record [10] in 1 volume(s). [8788406] (WWP) [Entered: 09/19/2013 06:54AM]
10/04/2013	14	Submitted (ECF) Answering Brief for review Submitted by Appellee Encino Motorcars, LLC. Date of service: 10/04/2013. [8809818]-[COURT UPDATE: Attached corrected brief. Resent NDA. 10/08/2013 by RY] (Calvert, Colin) [Entered: 10/04/2013 12:36 PM]
10/09/2013	15	Filed clerk order: The answering brief [14] submitted

Date Filed	#	Docket Text
		by Encino Motorcars, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF [8815176] (WWP) [Entered: 10/09/2013 11:03AM]
		***
10/18/2013	17	Submitted (ECF) Reply Brief for review Submitted by Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins. Date of service: 10/18/2013. [8827819] (Steinberg, S.) [Entered: 10/18/2013 03:51 PM]
		***
12/01/2014	20	Notice of Oral Argument on Wednesday, February 11, 2015 09:00 A.M. Courtroom 3 Pasadena, CA.

Date Filed	#	Docket Text
		View the Oral Argument Calendar for your case here. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: PASADENA Office. [9331468] (LN) [Entered: 12/01/2014 01:53PM]
***		
01/09/2015	26	REVISED: Notice of Oral Argument on Wednesday. February 11, 2015 09:30 A.M. Courtroom 3 Pasadena CA. View the Oral Argument Calendar for your case here. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: PASADENA Office. [9377506] (LN) [Entered: 01/0912015 04:22PM]
02/11/2015	27	ARGUED AND SUBMITTED TO SUSAN P GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN. [9417806]

Date Filed	#	Docket Text
		(LN) [Entered: 02/11/2015 11:44AM]
03/24/2015	28	FILED OPINION (SUSAN P. GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN) Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs. Judge: SPG Authoring, FILED AND ENTERED JUDGMENT [9468746]-[COURT UPDATE: In response to Appellants' motion to correct filed 11/19/15, the caption of the docket and opinion have been corrected. 11/24/2015 by RY] {MM) [Entered: 03/24/2015 08:33AM]
03/24/2015	29	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins Correspondence: Letter brief pursuant to Federal Rules of Appellate Procedure, Rule 28(j). Date of service: 03/24/2015 [9469052] [13-55323] (Steinberg, S.) [Entered: 03/24/2015 09:59AM]
03/31/2015	30	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector

Date Filed	#	Docket Text
		Navarro and Anthony Pinkins bill of costs (Form 10) in the amount of $118.08 USD. Date of service: 03/31/2015 [9478612] [13-55323] (Steinberg, S.) [Entered: 03/31/2015 11:43AM]
		***
04/03/2015	32	Filed (ECF) Appellee Encino Motorcars, LLC Motion to extend time to file petition for rehearing until 05/07/2015. Date of service: 04/03/2015. [9483173] [13-55323]-[COURT UPDATE: Updated docket text to reflect correct ECF filing type. 04/03/2015 by TL] (Calvert, Colin) [Entered: 04/03/2015 10:49 AM]
04/08/2015	33	Filed order (SUSAN P GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN): Appellee's unopposed motion for an extension of time to May 7, 2015, to file a petition for rehearing and rehearing en banc is GRANTED. [9488507] (AF) [Entered: 04/08/2015 02:22PM]
05/07/2015	34	Filed (ECF) Appellee Encino Motorcars, LLC petition for rehearing en banc (from

Date Filed	#	Docket Text
		03/24/2015 opinion). Date of service: 05/07/2015. [9529529] [13-55323] (Calvert, Colin) [Entered: 05/07/2015 03:23PM]
05/18/2015	35	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Brief of Amici Curiae National Automobile Dealers Assoc. and State Automobile Dealers Assocs. For Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington State ISO Petition for Rehearing En Banc of Defendants Encino Motorcars. Date of service: 05/18/2015. [9541549] [13-55323] (Reid, Felicia) [Entered: 05/18/2015 03:51 PM]
05/18/2015	36	Entered appearance of Amici Curiae NADA and State Automobile Dealers Associations for Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington State. [9541728] (LA) [Entered: 05/18/2015 04:47PM]
***		

Date Filed	#	Docket Text
05/22/2015	39	Filed (ECF) notice of appearance of Wendy McGuire Coats for Appellee Encino Motorcars, LLC. Date of service: 05/22/2015. [9547676] [13-55323]-[COURT UPDATE: Attached corrected notice (case number). 05/22/2015 by RY] (Calvert, Colin) [Entered: 05/22/2015 12:10 PM]
***		
06/01/2015	41	Filed order (SUSAN P GRABER, KIM MCLANE WARDLAW and JAMES C. MAHAN): Judges Graber and Wardlaw have voted to deny Appellee's petition for rehearing en banc, and Judge Mahan has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Appellee's petition for rehearing en banc is DENIED. [9556160] (AF) [Entered: 06/01/2015 09:50AM]
06/10/2015	42	MANDATE ISSUED.(SPG, KMW and JCM) Costs taxed against Appellee in the amount of $118.08. [9568325] (SW) [Entered: 06/10/2015 08:22AM]

Date Filed	#	Docket Text
08/24/2015	43	Received letter from the Supreme Court dated 08/20/2015 regarding the application for an ext of time within which to file a petition for a writ of cert...extended the time to and including 9/30/15. Application No: 15A210. [9659461] (RR) [Entered: 08/25/2015 11:31 AM]
10/07/2015	44	Received notice from the Supreme Court: petition for certiorari filed on 09/30/2015. Supreme Court Number 15-415. [9710170] (RR) [Entered: 10/07/2015 12:56 PM]
11/19/2015	45	Filed (ECF) Appellants Reuben Castro, Kevin Malone, Hector Navarro and Anthony Pinkins Motion for miscellaneous relief [Motion to Correct Caption]. Date of service: 11/19/2015. [9763631] [13-55323] (Steinberg, S.) [Entered: 11/19/2015 04:05 PM]
11/24/2015	46	Entered appearance of Appellant Mike Shirinian. [9769557] (HH) [Entered: 11/24/2015 02:32PM]
01/20/2016	47	Received notice from the Supreme Court. Petition for

Date Filed	#	Docket Text
		certiorari GRANTED on 01/15/2016. Supreme Court Number 15-415. [9834029] (RR) [Entered: 01/20/2016 03:38PM]

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION - LOS ANGELES

No. 2:12-cv-08051-RGK-MRW

HECTOR NAVARRO ET AL,

Plaintiff,

v.

MERCEDES BENZ OF ENCINO,

Defendant.

DOCKET ENTRIES

Date Filed	#	Docket Text
09/18/2012	1	COMPLAINT against Defendant Mercedes Benz of Encino. Case assigned to Judge R. Gary Klausner for all further proceedings. Discovery referred to Magistrate Judge Michael R Wilner. (Filing fee $ 350 PAID.) Jury Demanded., filed by Plaintiffs Mike Shirinian, Hector Navarro, Anthony Pinkins, Kevin Malone, Reuben Castro.(et) (mg). (Entered: 09/24/2012)
09/18/2012		21 DAY Summons Issued re Complaint (Discovery) 1 as to Defendant Mercedes Benz of Encino. (et) (Entered: 09/24/2012)

Date Filed	#	Docket Text
09/18/2012	2	CERTIFICATION AND NOTICE of Interested Parties filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (et) (mg). (Entered: 09/24/2012)
09/24/2012	3	STANDING ORDER by Judge R. Gary Klausner. (rne) (Entered: 09/25/2012)
		***
11/15/2012	5	[DOCUMENT STRICKEN] NOTICE OF MOTION AND MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* filed by Defendant Mercedes Benz of Encino. Motion set for hearing on 12/17/2012 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum, # 2 Declaration of Colin P Calvert with Exhibit A, # 3 Notice of Lodgment, # 4 Exhibit A-D to Lodgment, # 5 Exhibit E-K to Lodgment, # 6 Proposed Order)(Calvert, Colin) Modified on 11/16/2012 (rne). (Entered: 11/15/2012)
11/15/2012	6	REQUEST FOR JUDICIAL NOTICE re MOTION to

Date Filed	#	Docket Text
		Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 5 filed by Defendant Mercedes Benz of Encino. (Calvert, Colin) (Entered: 11/15/2012)
11/16/2012	7	ORDER TO STRIKE ELECTRONICALLY FILED DOCUMENTS by Judge R. Gary Klausner: the following document(s) be STRICKEN for failure to comply with the Local Rules, General Order and/or the Courts Case Management Order: MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State a Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 5, for the following reasons: Local Rule 7.1-1 No Certification of Interested Parties and/or no copies. (rne) (Entered: 11/16/2012)

Date Filed	#	Docket Text
11/16/2012	8	of Interested Parties filed by Defendant Mercedes Benz of Encino, (Calvert, Colin) (Entered: 11/16/2012)
11/16/2012	9	NOTICE OF MOTION AND MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* filed by Defendant Mercedes Benz of Encino. Motion set for hearing on 12/17/2012 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of Colin P Calvert with Exhibit A, # 3 Notice of Lodgment, # 4 Exhibit A-D to Lodgment, # 5 Exhibit E-K to Lodgment, # 6 Proposed Order)(Calvert, Colin) (Entered: 11/16/2012)
11/16/2012	10	REQUEST FOR JUDICIAL NOTICE re MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 filed by Defendant Mercedes

Date Filed	#	Docket Text
		Benz of Encino. (Calvert, Colin) (Entered: 11/16/2012)
11/19/2012	11	NOTICE of Related Case(s) filed by Defendant Mercedes Benz of Encino. Related Case(s): None (Calvert, Colin) (Entered: 11/19/2012)
11/19/2012	12	MINUTES: (IN CHAMBERS) NOTICE TO ALL PARTIES AND ORDER: On the Court's own motion, defendant Mercedes Benz of Encino's Motion to Dismiss Case 9 , filed on November 16, 2012 and noticed for hearing on December 17, 2012 at 9:00 a.m., is hereby CONTINUED TO January 7, 2013 at 9:00 a.m. IT IS SO ORDERED by Judge R. Gary Klausner. (ir) (Entered: 11/19/2012)
12/12/2012	13	NOTICE OF MOTION AND MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. Motion set for hearing on 1/14/2013 at 09:00 AM before Judge R. Gary Klausner. (Attachments:

Date Filed	#	Docket Text
		# 1 Proposed Order Re Motion for Sanctions in the Amount of $19,175.00 Pursuant to Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9)(Steinberg, S) (Entered: 12/12/2012)
12/17/2012	14	to Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6); Memorandum of Points and Authorities; Declaration of S. Keven Steinberg; Exhibits Opposition re: MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 *Plaintiff's Opposition to Motion* filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/17/2012)
12/17/2012	15	REQUEST FOR JUDICIAL NOTICE re MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP*

Date Filed	#	Docket Text
		12(b)(6) MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 *"Request for Judicial Notice in Support of Plaintiffs' Opposition to Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6)); Exhibit"* filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/17/2012)
12/21/2012	16	OPPOSITION in opposition re: MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 13 filed by Defendant Mercedes Benz of Encino. (Attachments: # 1 Declaration Colin P Calvert in support, # 2 Declaration Todd B. Scherwin in support)(Calvert, Colin) (Entered: 12/21/2012)
12/21/2012	17	OPPOSITION in opposition re: MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to*

Date Filed	#	Docket Text
		State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6) 9 filed by Defendant Mercedes Benz of Encino. (Calvert, Colin) (Entered: 12/21/2012)
12/21/2012	18	NOTICE OF ERRATA filed by Defendant Mercedes Benz of Encino. correcting Objection/Opposition (Motion related), Objection/Opposition (Motion related) 17 (Calvert, Colin) (Entered: 12/21/2012)
12/21/2012	19	REPLY in support MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* MOTION to Dismiss Case *For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6)* 9 filed by Defendant Mercedes Benz of Encino. (Calvert, Colin) (Entered: 12/21/2012)
12/31/2012	20	REPLY Reply to Opposition to Motion for Sanctions MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 13 ; *Memorandum of Points and Authorities; Declaration of S. Keven Steinberg; Exhibit* filed by

Date Filed	#	Docket Text
		Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/31/2012)
12/31/2012	21	REQUEST FOR JUDICIAL NOTICE *in Support of Plaintiffs' Reply to Opposition to Motion for Sanctions in the Amount of $19,175.00 Pursuant to Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9* filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 12/31/2012)
01/02/2013	22	(IN CHAMBERS) NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. Defendants Motion to Dismiss Case For Failure to State A Claim Upon Which Relief Can Be Granted FRCP 12(b)(6) (DE 9), noticed for hearing on January 7, 2013, has been taken under submission and off the motion calendar. No appearances by counsel are necessary. The Court will issue a ruling after full consideration

Date Filed	#	Docket Text
		of properly submitted pleadings. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY.(sw) TEXT ONLY ENTRY (Entered: 01/02/2013)
01/03/2013	23	ORDER SETTING SCHEDULING CONFERENCE by Judge R. Gary Klausner. Rule 26 Meeting Report due by 3/4/2013. Scheduling Conference set for 3/11/2013 09:00 AM before Judge R. Gary Klausner. (rne) (Entered: 01/03/2013)
01/09/2013	24	MINUTE ORDER IN CHAMBERS by Judge R. Gary Klausner: re: MOTION for Sanctions Federal Rules of Civil Procedure Rule 11 and Local Rule 11-9 13 The above-referenced motion, noticed for hearing on January 14, 2013, has been taken under submission and off the motion calendar. No appearances by counsel are necessary. (rne) (Entered: 01/09/2013)
01/25/2013	25	MINUTES: (IN CHAMBERS) Order Re: Defendant's Motion to Dismiss 9 The Court GRANTS Defendant's Motion to Dismiss

Date Filed	#	Docket Text
		as to Plaintiffs' First, Third, Fifth, and Seventh claims. The Court sua sponte DISMISSES the remaining state law causes of action. As such, Plaintiffs' Complaint is dismissed in its entirety IT IS SO ORDERED by Judge R. Gary Klausner. (MD JS-6. Case Terminated) (ir) (Entered: 01/25/2013)
02/14/2013	26	MINUTES: (IN CHAMBERS) Order Re: Plaintiff's Motion for Sanctions Pursuant to FRCP 11 13 is DENIED IT IS SO ORDERED by Judge R. Gary Klausner. (ir) (Entered: 02/14/2013)
02/22/2013	27	NOTICE Notice of Appeal-Plaintiffs' Notice of Appeal to the United States Court of Appeal for the Ninth Circuit of Order Re: Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6) Representation Statement filed by Plaintiffs and Appellants Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. (Steinberg, S) (Entered: 02/22/2013)

Date Filed	#	Docket Text
02/25/2013	28	NOTICE OF ERRATA filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. correcting Notice (Other), 27 *RE Notice of Appeal Plaintiffs' Notice of Appeal to the United States Court of Appeal For the Ninth Circuit of Order Re: Motion to Dismiss For Failure to State a Claim Upon Which Relief Can be Granted (FRCP 12(B)(6))* (Steinberg, S) (Entered: 02/25/2013)
02/25/2013	29	NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike Shirinian. Appeal of Order on Motion to Dismiss Case, 25 (Appeal fee of $455 receipt number 0973-11715457 paid.) (Steinberg, S) (Entered: 02/25/2013)
02/26/2013	30	NOTIFICATION by Circuit Court of Appellate Docket Number 13-55323, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals, 29 as to Plaintiffs Reuben Castro, Kevin Malone, Hector Navarro, Anthony Pinkins, Mike

Date Filed	#	Docket Text
		Shirinian. (car) (Entered: 03/01/2013)
03/24/2015	31	OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs. [See document for all details] (mat) (Main Document 31 replaced on 11/25/2015) (mat).[Per 9th CCA][The opinion has been corrected. 11/24/2015 Modified on 11/25/2015 (mat). (Entered: 03/26/2015)
04/08/2015	32	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Appellee's unopposed motion for an extension of time

Date Filed	#	Docket Text
		to May 7, 2015, to file a petition for rehearing and rehearing en banc is GRANTED. (car) (Entered: 04/09/2015)
06/01/2015	33	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 29 filed by Mike Shirinian, Kevin Malone, Anthony Pinkins, Reuben Castro, Hector Navarro. CCA # 13-55323. Appellee's petition for rehearing en banc is DENIED. (mat) (Entered: 06/03/2015)
06/10/2015	34	MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal 29 CCA # 13-55323. The judgment of the 9th Circuit Court, entered March 24, 2015, takes effect this date. This constitutes the formal mandate of the 9th CCA issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. Costs are taxed against the appellee in the amount of $118.08. [See USCA OPINION 31 AFFIRMED, REVERSED AND REMANDED] (mat) (Entered: 06/12/2015)

Date Filed	#	Docket Text
06/18/2015	35	SCHEDULING NOTICE TO ALL PARTIES AND ORDER by Judge R. Gary Klausner. A scheduling conference has been placed on calendar for September 21, 2015 at 9:00 a.m. The Conference will be held pursuant to F.R.Civ. P 16(b). Trial counsel must be present and there are no telephonic appearances. Counsel are ordered to file a joint statement providing a brief factual summary of the case, including the claims being asserted. The parties are reminded of their obligations to disclose information and confer on a discovery plan not later than 21 days prior to the scheduling conference, and to file a joint statement with the Court not later than 14 days after they confer, as required by F.R. Civ.P 26 and the Local Rules of this Court. Failure to comply may lead to the imposition of sanctions. Plaintiffs counsel is directed to give notice of the scheduling conference to each party that makes an initial appearance in the action after this date. Not later than 5 court

Date Filed	#	Docket Text
		days prior to the Scheduling Conference, counsel are ordered to confer and electronically file (joint) Form ADR-1 (and proposed order, Form ADR 12), selecting one of the three settlement options available. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY (pso) TEXT ONLY ENTRY (Entered: 06/18/2015)
09/01/2015	36	STIPULATION to Continue Scheduling Conference from September 21, 2015 to January 19, 2016 filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Proposed Order Order Granting Joint Stipulation Requesting a Continuance of Scheduling Conference)(Calvert, Colin) (Entered: 09/01/2015)
09/02/2015	37	ORDER GRANTING STIPULATION JOINT STIPULATION REQUESTING A CONTINUANCE OF SCHEDULING CONFERENCE 36 by Judge R. Gary Klausner. Pursuant to the stipulation of the parties, and good cause appearing, Scheduling

Date Filed	#	Docket Text
		Conference currently scheduled for September 21, 2015 has been continued to December 14, 2015 at 9:00 a.m. (lom) (Entered: 09/02/2015)
11/06/2015	38	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sara Hernandez and Keven Steinberg of Fink & Steinberg filed by PLAINTIFF Hector Navarro. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	39	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by PLAINTIFF Mike Shirinian. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	40	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by Plaintiff Anthony Pinkins. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	41	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink,

Date Filed	#	Docket Text
		Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by Plaintiff Kevin Malone. (Steinberg, Keven) (Entered: 11/06/2015)
11/06/2015	42	REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg filed by Plaintiff Reuben Castro. (Steinberg, Keven) (Entered: 11/06/2015)
11/09/2015	44	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Hector Navarro, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 38 (bp) Modified on 11/13/2015 (bp). (Entered: 11/13/2015)
11/09/2015	45	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby

Date Filed	#	Docket Text
		orders that the request of: Kevin Malone, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Kevin Steinberg of Fink & Steinberg, 41 (bp) (Entered: 11/13/2015)
11/09/2015	46	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Anthony Pinkins, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 40 (bp) (Entered: 11/13/2015)
11/09/2015	47	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTORNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Mike Shirinian, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 39 (bp) (Entered: 11/13/2015)

Date Filed	#	Docket Text
11/09/2015	48	ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OF ATTOERNEY by Judge R. Gary Klausner: The Court hereby orders that the request of: Reuben Castro, Plaintiff to substitute Keven Steinberg as attorney of record instead of Keith Frank, Sarah Hernandez and Keven Steinberg of Fink & Steinberg, 42 (bp) (Entered: 11/13/2015)
11/10/2015	43	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 42 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 39 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven

Date Filed	#	Docket Text
		Steinberg of Fink & Steinberg 41 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sara Hernandez and Keven Steinberg of Fink & Steinberg 38 , REQUEST TO SUBSTITUTE ATTORNEY Keven Steinberg in place of attorney Keith Fink, Sarah Hernandez and Keven Steinberg of Fink & Steinberg 40 The following error(s) was found: Other error(s) with document(s) are specified below: G-01 Request for Approval of Substitution of Attorney or Withdrawal of Counsel not submitted. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (bp) (Entered: 11/10/2015)
11/19/2015	49	STIPULATION to Continue Scheduling Conference from 12/14/15 to April 13, 2016 (120

Date Filed	#	Docket Text
		days) filed by defendant Mercedes Benz of Encino. (Attachments: # 1 Proposed Order Granting Joint Stipulation Requesting A Continuance of Scheduling Conference)(Calvert, Colin) (Entered: 11/19/2015)
11/20/2015	50	ORDER GRANTING JOINT STIPULATION REQUESTING A CONTINUANCE OF SCHEDULING CONFERENCE TO 2/22/2016 at 09:00 AM 49 by Judge R. Gary Klausner (lc) (Entered: 11/20/2015)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:12-cv-08051-RGK-MRW

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, and REUBEN CASTRO,

Plaintiffs,

v.

MERCEDES BENZ OF ENCINO, a Corporation,

Defendant.

Plaintiffs Hector Navarro, Anthony Pinkins, Kevin Malone and Reuben Castro, by and through its attorneys of record, for its Complaint against Defendants, allege as follows:

JURISDICTION

1. Original jurisdiction is had in this action which is being brought pursuant to the *Fair Labor Standards Act* ("FLSA"), codified at 29 U.S.C. § 201, *et seq*.

2. This Court also has supplemental jurisdiction over the California State Law claims under 28 U.S.C § 1367 in that all such claims are so related to claims in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

VENUE

3. Venue is proper in this Court under 28 U.S.C. §1391 in that all parties, including the Defendants reside or are domiciled in this State; because all or a

substantial part of the acts, events or omissions giving rise to the claims occurred in this District; and there appears to be no other District in which this action may otherwise be brought.

PARTIES

4. Hector Navarro is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

5. Mike Shirinian is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

6. Anthony Pinkins is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

7 Kevin Malone is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

8. Reuben Castro is and at all times relevant hereto was and individual and a resident of the County of Los Angeles, State of California.

9. Mercedes Benz of Encino ("MBE") is believed to be a Corporation existing under the laws of the State of California with its principal place of business in Encino, which is in the County of Los Angeles, State of California.

10. Hector Navarro, Anthony Pinkins, Kevin Malone and Reuben Castro (collectively, ("Plaintiffs") are current or former employees of Defendant MBE pursuant to and as defined in 29 U.S.C. §203.

11. MBE is or was the employer of Plaintiffs pursuant to and as defined in 29 U.S.C. §203.

12. MBE at all times alleged herein, was engaged in commerce pursuant to and as defined in 29 U.S.C. §203.

GENERAL ALLEGATIONS

13. Plaintiffs bring this action to recover for, *inter alia*: failure to pay wages for hours worked, failure to pay overtime wages, failure to pay minimum wages and unpaid meal and rest periods.

14. Plaintiff Reuben Castro is a former and Plaintiffs Hector Navarro, Anthony Pinkins and Kevin Malone are current Service Advisors of MBE, who held and/or currently hold non-exempt positions at MBE in the State of California for a period of time within the four (4) years preceding the filing of this action.

15. MBE owns, operates and manages a Mercedes Benz automobile dealership in Encino, California. MBE sells and services both new and used Mercedes Benz automobiles. As part of the dealership, MBE has a service center where Service Advisors, such as Plaintiffs, are employed to accept cars for service at this dealership. These Service Advisors, including Plaintiffs are mandated to work at MBE from 7:00 a.m. to 6:00 p.m. at least five (5) days a week. During this time period, the Service Advisors, including Plaintiffs are required to remain at their service posts or constantly be "on call" and available by cell phone, email or text message should MBE or its customers need them for anything. While oftentimes these Service Advisors, including Plaintiffs are unable to take a meal or rest break, when indeed they are able to do so, they must remain "on call" and are frequently interrupted to attend to their work duties. Even

during vacations, the Service Advisors, including Plaintiffs must remain "on-call."

16. The job duties and obligations of these Service Advisors, including Plaintiffs are to meet and greet Mercedes Benz owners as they enter the service area of the dealership and then to evaluate the service and/or repair needs of the vehicle owner in light of complaints given them by these vehicle owners. Upon evaluation of the service needs of the vehicle, the Service Advisors, including Plaintiffs then solicit and suggests that certain service be conducted on the vehicle to remedy the complaints of the vehicle owner by conducting certain repairs at MBE and through MBE's own mechanics. The Service Advisors, including Plaintiffs are also duty bound and obligated by MBE to solicit and suggest that supplemental service be performed on the vehicle above and beyond that which is required in response to the initial complaints of the vehicle owner. The Service Advisors, including Plaintiffs then write up an estimate for the repairs and services and provides that to the vehicle owner. The vehicle is then taken to the mechanics at MBE for repair and maintenance.

17 As required by MBE and oftentimes while the vehicle is with MBE mechanics, the Service Advisors, including Plaintiffs will then call the vehicle owner and solicit and suggest that additional work be performed on the vehicle at additional cost.

18. The Service Advisors, including Plaintiffs are not paid a salary or an hourly wage. Instead, MBE mandates that the Service Advisors, including Plaintiffs work on a pure commission basis. Specifically, the Service Advisors', including Plaintiffs'

source of revenue is based on what services he can solicit and suggest to the MBE customer. Thus, the more "up-selling" the Service Advisor does, the greater his commission will be.

19. As part of MBE training and during MBE employee meetings, MBE instructs its Service Advisors, including Plaintiffs to solicit and suggest to the vehicle owner, as many repairs to the vehicle as possible, including "preventative maintenance" or "periodic" or "scheduled" maintenance. With this, MBE derives greater income and revenue and the Service Advisor's, including Plaintiffs' commission is greater.

20. Also part of the Service Advisors' and Plaintiffs' duties and obligations is a mandate of MBE to remain in telephone contact with MBE customers at all times during work Horus. As such, MBE requires the Service Advisors, including Plaintiffs to use MBE phones to keep in such contact.

21. While the Service Advisors, including Plaintiffs work from 7:00 a.m. to 6:00 p.m. daily, not until recently has MBE implemented a system to track and record the work hours of these Service Advisors and Plaintiffs. Thus, MBE has failed for many years to properly account and track the long work hours of these Service Advisors and Plaintiffs.

22. MBE maintains a workplace that violates numerous Federal and California wage and hour laws. Specifically, they exploit and take advantage of their Service Advisors, including Plaintiffs by, *inter alia*, refusing to pay overtime compensation, refusing to pay for all hours worked, refusing to pay minimum

wage, refusing to provide them with meal and rest breaks, and refusing to provide accurate and itemized wage statements.

23. Throughout Plaintiffs' employment, MBE failed to provide Plaintiffs with accurate and itemized wage statements showing, among other things, gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate. MBE also failed to maintain complete and accurate payroll records for Plaintiffs showing, among other things, gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate.

FIRST CAUSE OF ACTION

VIOLATIONS OF *FAIR LABOR STANDARDS ACT* [29 U.S.C. § 201, *et seq.*]

24. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 23, inclusive.

25. Fair Labor Standards Act ("FLSA") regulation 29 C.F.R. § 779.372(c)(4) as originally enacted some time ago, provided that a service manager, service writer, service advisor, or service salesman at an automobile dealership, who is not primarily engaged in the work of a salesman, partsman, or mechanic is not exempt under section 13(b)(10)(A). However, Section 779.372(c)(4) was deleted from the regulations in April 2011.

26. Specifically, on April 5, 2011, the Department of Labor decided not to adopt the proposed changes to Section 779.372(c)(4) and instead, agreed with the position of the AFL-CIO and determined that Service Advisors should be treated as overtime eligible as stated in the current regulation. The Department of Labor announcement went on the say that "the Department has concluded that the current 779.372(c) sets forth the 'appropriate approach' to determining whether employees in such positions are subject to the exemption." 76 Federal Register 18838 (April 5, 2011).

27. Additionally. Industrial Welfare Commission Wage Orders contained in Title 8 of the *California Code of Regulations* (Wage Orders) applies to Plaintiffs in their capacity as employees of MBE. The Wage Orders provide, among other things, that for each hour in excess of forty (40) hours per week and/or each hour in excess of eight (8) hours per day, Plaintiffs should receive pay at not less than one and one-half (1½) times their regular rate of pay. The Wage Orders also provide that for any work in excess of twelve (12) hours per day, Plaintiffs should receive pay at not less than twice their regular rate of pay.

28. Throughout their employment with MBE, Plaintiffs were not exempt employees under the Wage Orders or Federal or California law Plaintiffs were neither persons employed in an administrative, executive nor professional capacity as defined in the Wage Orders and Federal or California law.

29. Plaintiffs as part of their job duties were required to work in excess of forty (40) hours per week and/or eight (8) hours per day and have not been paid any overtime wage.

30. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, under the FLSA, for uncompensated overtime as required under the Wage Orders and Federal or California law, to the fullest extent permitted under the statutory time period and pursuant to 29 U.S.C. §§ 215 and 216.

31. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§215 and 216].

SECOND CAUSE OF ACTION

VIOLATIONS OF CALIFORNIA *LABOR CODE* § 510 AND 1194, *et seq.*

32. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 31, inclusive.

33. Throughout their employment with MBE, Plaintiffs were not exempt employees under the Wage Orders or Federal or California law. Plaintiffs were neither persons employed in an administrative, executive nor professional capacity as defined in the Wage Orders and Federal or California law.

34. Plaintiffs as part of their job duties were required to work in excess of forty (40) hours per week and/or eight (8) hours per day and have not been paid any overtime wage. Pursuant to California *Labor Code* § 510, an employer must pay an employee overtime when the employee works more than eight (8) hours a day.

35. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, under *Labor Code* §§ 510 and 1194, *et seq.*, for uncompensated overtime as required under the Wage Orders and Federal or California law, to the fullest extent permitted under the statutory time period.

36. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs seek attorneys' fees and costs incurred in prosecuting this action under California *Labor Code* § 1194, *et seq.*

THIRD CAUSE OF ACTION

VIOLATIONS OF *FLSA* [29 U.S.C. §206]

(AGAINST MBE AND DOES 1 TO 50)

37 Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 36, inclusive.

38. As alleged herein, at all relevant times, the FLSA and Wage Orders applied to Plaintiffs in their capacity as employees of MBE. 29 U.S.C. §206 states in pertinent part, that every employee shall pay to each employee, not less than $5.85 per hour beginning on the 60th day after May 25, 2007; $6.55 an hour beginning 12 month after that 60th day; and $7.25 an hour, beginning 24 months after that 60th day The Wage Orders of the State of California provide, among other things, that all employees in California must be paid the minimum wage as required by state law, which is currently eight dollars ($8.00) per hour.

39. As alleged herein, Plaintiffs were required to work for wages less than the legal minimum fixed by California law and/or were required to work without any payment of wages whatsoever.

40. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, under 29 U.S.C. §206 as well as under California *Labor Code* § 1194, *et seq.*, for MBE's failure to pay Plaintiffs the legal minimum wage and/or payment of actual wages for all hours worked as required under the Wage Orders and Federal and California law, to the fullest extent permitted under the statutory time period.

41. In addition, pursuant to the FLSA [29 U.S.C. §§215 and 216] and California *Labor Code* § 1194.2, Plaintiffs are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

42. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§215 and 216] and California *Labor Code* § 1194, *et seq.*

FOURTH CAUSE OF ACTION
VIOLATIONS OF CALIFORNIA *LABOR CODE* §§ 1197 AND 1194, *et seq.*
(AGAINST MBE AND DOES 1 TO 50)

43. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 42, inclusive.

44. As alleged herein, at all relevant times, the FLSA and Wage Orders and California Laws applied to Plaintiffs in their capacity as employees of MBE. Pursuant to California *Labor Code* § 1197, "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful." The Wage Orders of the State of California provide, among other things, that all employees in California must be paid the minimum wage as required by state law. which is currently eight dollars ($8.00) per hour.

45. As alleged herein, Plaintiffs were required to work for wages less than the legal minimum fixed by California law and/or were required to work without any payment of wages whatsoever.

46. Plaintiffs bring this action to recover the balance of all unpaid wages owed to them, with interest thereon, for MBE's failure to pay Plaintiffs the legal minimum wage and/or payment of actual wages for all hours worked as required under the Wage Orders and Federal and California law, to the fullest extent permitted under the statutory time period.

47. In addition, Plaintiffs are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

48. In addition to payment of their past wages and all applicable penalties allocable under the law, with interest thereon, Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action.

FIFTH CAUSE OF ACTION
VIOLATIONS OF FLSA [29 U.S.C. §207]
(AGAINST DEFENDANTS AND DOES 1 TO 50)

49. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 43, inclusive.

50. Pursuant to the FLSA [29 U.S.C. §207] employees must be paid extra compensation for working overtime and no employer shall require an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

51. During their employment with MBE, Plaintiffs worked hours in excess of eight (8) hours a day and forty (40) hours a week and were denied this right and forced to forgo their legally required meal and rest periods and/or they were interrupted by MBE in violation of law.

52. As a result of MBE's failing to provide them with overtime pay and meal and rest breaks, Plaintiffs sustained damages in the amount of extra compensation due them for each overtime hour as well as wages due and entitled to one (1) additional hour of pay at their regular rate of compensation for each time they were not provided with a meal or rest period, in an exact amount to be determined at trial, to the fullest extent permitted under the statutory time period and pursuant to the FLSA [29 U.S.C. §§215 and 216].

53. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§215 and 216].

SIXTH CAUSE OF ACTION

VIOLATIONS OF CALIFORNIA *LABOR CODE* §§ 226.7 AND 512

(AGAINST DEFENDANTS AND DOES 1 TO 50)

54. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 48, inclusive.

55. Pursuant to California *Labor Code* §§ 226.7 and 512 employees must be paid extra compensation for working overtime and no employer shall require an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

56. During their employment with MBE, Plaintiffs worked hours in excess of eight (8) hours a day and forty (40) hours a week and were denied this right and forced to forgo their legally required meal and rest periods and/or they were interrupted by MBE in violation of law.

57. As a result of MBE's failing to provide them with overtime pay and meal and rest breaks, Plaintiffs sustained damages in the amount of extra compensation due them for each overtime hour as well as wages due and entitled to one (1) additional hour of pay at their regular rate of compensation for each time they were not provided with a meal or rest period pursuant to California *Labor Code* § 226.7, in an exact

amount to be determined at trial, to the fullest extent permitted under the statutory time period.

58. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under California *Labor Code* § 1194, *et seq.*

SEVENTH CAUSE OF ACTION

VIOLATION OF VIOLATIONS OF FLSA [29 U.S.C. §211]

(AGAINST DEFENDANTS AND DOES 1 TO 50)

59. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs I through 53, inclusive.

60. An employer must provide with each payment of wages an accurate itemized statement in writing, showing, *inter alia*, the gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate. Furthermore, an employer to afford current and former employees the right to inspect or copy the employment records.

61. MBE failed to provide accurate itemized statements to Plaintiffs at each time of payment of wages furnished to Plaintiffs throughout their employment as required. Additionally, they failed to maintain complete and accurate payroll records, eviscerating Plaintiffs' rights and in violation of the FLSA [29 U.S.C. §211].

62. As a result of MBE' failing to provide them with accurate itemized wage statements, Plaintiffs sustained damages and are entitled to at least fifty

dollars ($50.00) for the initial pay period and at least one hundred dollars ($50.00) for each subsequent pay period an accurate itemized wage statement was not provided, in an exact amount to be determined at trial, to the fullest extent permitted under the statutory time period. Plaintiffs also sustained damages as a result of MBE's violation of 29 U.S.C. §211 and is entitled to damages pursuant to 29 U.S.C. §§215 and 216.

63. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under the FLSA [29 U.S.C. §§215 and 216].

EIGHTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA *LABOR CODE* § 226, *et seq.*

(AGAINST DEFENDANTS AND DOES 1 TO 50)

64. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 58, inclusive.

65. Pursuant to California *Labor Code* § 226(a), an employer must provide with each payment of wages an accurate itemized statement in writing, showing, *inter alia*, the gross wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate. Furthermore, California *Labor Code* § 226(b) requires an employer to afford current and former employees the right to inspect or copy the records pertaining to subdivision (a).

66. MBE failed to provide accurate itemized statements to Plaintiffs at each time of payment of wages furnished to Plaintiffs throughout their employment as required by California *Labor Code* § 226(a). Additionally, they failed to maintain complete and accurate payroll records, eviscerating Plaintiffs' right under California *Labor Code* § 226(b).

67 As a result of MBE' failing to provide them with accurate itemized wage statements, Plaintiffs sustained damages and are entitled to fifty dollars ($50.00) for the initial pay period and one hundred dollars ($50.00) for each subsequent pay period an accurate itemized wage statement was not provided pursuant to California *Labor Code* § 226(e), in an exact amount to be determined at trial, to the fullest extent permitted under the statutory time period.

68. Plaintiffs will seek attorneys' fees and costs incurred in prosecuting this action under California *Labor Code* § 1194, *et seq.*

NINTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA *BUSINESS & PROFESSIONS CODE* §17200, *et seq.*

(AGAINST DEFENDANTS AND DOES 1 TO 50)

69. Plaintiffs reallege and incorporate herein by reference, as though set forth in full, each and every allegation contained in Paragraphs 1 through 63, inclusive.

70. California *Business & Professions Code* § 17200, *et seq.*, provides that unfair competition shall mean and include "all unlawful, unfair or fraudulent business act or practices and unfair, deceptive, untrue or misleading advertising."

71. Plaintiffs are informed and believe and thereon allege that MBE and DOES 1-50 have engaged in unfair competition in violation of California *Business & Professions Code* § 17200, *et seq.*, by maintaining a workplace rife with wage and hour violations.

72. Such business practices are also a violation of California public policy, including but not limited to the following: California *Constitution*, Article I, § 8, California wage and hour laws, the FLSA and California *Civil Code* § 1770, *et seq.* The maintenance of such unfair business practices allows MBE to maintain an unfair advantage over other companies which comply with these laws, and the public policy of the State of California.

73. MBE falls within the definition of "person" as set forth at California *Business & Professions Code* §§ 17203 and 17506.

74. The unlawful, unfair, and fraudulent business practices of MBE described above present a continuing threat to members of the public in that MBE have or will soon engage in the conduct described above and members of the public are likely to be deceived when they pursue or gain employment with MBE. Pursuant to California *Business & Professions Code* § 17203, Plaintiffs seek an order from this Court that:

a. Provides injunctive and declaratory relief finding that MBE has violated the provisions, of California *Business & Professions Code* § 17200, *et seq.*; and

b. For an order enjoining MBE and its respective successors, agents, servants, officers, directors, employees, and all other persons acting in concert

with them, directly or indirectly, from engaging in conduct which violates California *Business & Professions Code* § 17200, *et seq.*

WHEREFORE, Plaintiffs pray for judgment against MBE as follows:

1. For general and compensatory damages, including prejudgment interest, in accordance with exact proof at the time of trial;

2. For unpaid wages, overtime pay, and any other benefits to which Plaintiffs would have been entitled to by reason of their employment with MBE, according to proof;

3. For Plaintiffs' costs and attorneys' fees;

4. For restitution and/or disgorgement of all ill-gotten gains (as to the Ninth Cause of Action);

5. For preliminary and permanent injunction against MBE from the acts of unfair competition as described in the Ninth Cause of Action; and

6. For such other and further relief as the Court may deem just and proper.

DATED:
September 14, 2012

FINK & STEINBERG

By: s/Keith A. Fink
Keith A. Fink
Sarah E. Hernandez
Attorneys for Plaintiffs
HECTOR NAVARRO,
MIKE SHIRINIAN,
ANTHONY PINKINS,
KEVIN MALONE and
REUBEN CASTRO

DEMAND FOR JURY

Plaintiffs hereby demand a jury trial on all such claims where a jury trial is permitted.

DATED:
September 14, 2012

FINK & STEINBERG

By: s/Keith A. Fink
Keith A. Fink
Sarah E. Hernandez
Attorneys for Plaintiffs
HECTOR NAVARRO,
MIKE SHIRINIAN,
ANTHONY PINKINS,
KEVIN MALONE and
REUBEN CASTRO

No. 15-415

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. FLOWER STREET
SUITE 1590
LOS ANGELES, CA 90071
(213) 330-4450

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

February 29, 2016

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

Counsel for Petitioner

QUESTION PRESENTED

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week.

The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims, concluding that a service advisor is a "salesman ... engaged in ... servicing automobiles" and is thus exempt from the FLSA's overtime requirements. The Ninth Circuit reversed, deferring to a Department of Labor interpretive regulation stating that service advisors are not exempt under §213(b)(10)(A) because they do not *personally* service automobiles. The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," all of which hold that service advisors are exempt employees. Pet.App.11.

The question presented is whether "service advisors" at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

PARTIES TO THE PROCEEDING

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the Ninth Circuit. Respondents Hector Navarro, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the Ninth Circuit. Respondent Mike Shirinian was erroneously omitted from the caption of the court of appeals' opinion, although the court's opinion included his name in its discussion of the factual and procedural history. The Ninth Circuit corrected the caption below on November 24, 2015.

CORPORATE DISCLOSURE STATEMENT

Encino Motorcars, LLC is a limited liability corporation doing business as Mercedes Benz of Encino. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Webster's Third New Int'l Dictionary (1976) 26

INTRODUCTION

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. They are integral to the servicing process and are the salespeople dedicated to the servicing business at their dealership. And, like countless other salespeople, Respondents receive commissions tied to their sales rather than being compensated exclusively by hourly wages or a salary.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). For more than 40 years, federal and state courts across the country uniformly held that service advisors such as Respondents are covered by the exemption because they are "salesm[e]n ... engaged in ... servicing automobiles." *See, e.g., Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). Those courts also refused to defer to the sometimes view of the Department of Labor (DOL) that service advisors are not exempt because they do not *personally* service vehicles. As a consequence, DOL acquiesced in the lower courts' uniform view for over three decades.

Undeterred by the unbroken line of judicial precedents, Respondents brought suit against their employer under the FLSA, alleging that they were entitled to time-and-a-half overtime pay for time worked each week in excess of 40 hours. Relying on

the reasoning of the many cases finding service advisors to be exempt, the district court dismissed the complaint. Pet.App.25-29. The Ninth Circuit reversed. Unlike every other court to consider the issue, the Ninth Circuit held that service advisors were not exempt under §213(b)(10)(A). Pet.App.19.

The Ninth Circuit's interpretation badly misconstrues the text of §213(b)(10)(A). Congress' use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" broadens the exemption and makes clear that a salesman is exempt if he is "engaged in" *either* of those activities. And the exemption's coverage of "*any* salesman" demonstrates that Congress legislated broadly and did not intend to divide a dealership's salesforce in half, treating as exempt only those salespeople engaged in selling automobiles, and not those engaged in servicing automobiles.

Despite this clear statutory language, the Ninth Circuit insisted that service advisors were not exempt because they do not *personally* service automobiles in the same manner as a mechanic. Pet.App.13. But exempting only those employees who personally service automobiles as directly as mechanics (*e.g.*, those who themselves change spark plugs or replace brake pads) injects a word into the statute and introduces a glaring textual anomaly over the status of "partsmen," who are employees who requisition, stock, and dispense parts in the servicing process. Even though partsmen do not *personally* service automobiles as directly as mechanics, they are primarily engaged in activities related to the servicing of automobiles and are unquestionably exempt under

§213(b)(10)(A). The phrase "primarily engaged in ... servicing automobiles" is not limited to mechanics who personally go under the hood and service automobiles, but extends to partsmen and service advisors who are primarily engaged in the *servicing process*.

The Ninth Circuit's decision upends an area of law that had been settled for more than 40 years. Affirming the decision below would have significant negative consequences for the nation's 18,000 car dealerships, which currently employ an estimated 45,000 service advisors. Those dealerships and their service advisors have operated under mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt from the FLSA. If allowed to stand, the Ninth Circuit's decision would require a wholesale (and wholly unwarranted) restructuring of the way in which those employees are compensated, and would force dealerships to divide their salesforces into exempt and non-exempt categories in ways that are both divisive and contrary to Congress' plain intent.

* * *

This Court has repeatedly rejected plaintiffs' attempts to impose significant retroactive liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g., Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2014); *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012). This Court should reject Respondents' attempt to impose substantial and unexpected liability on automobile dealerships based on a countertextual interpretation of the statute that

courts—and, previously, even DOL itself—had correctly and repeatedly rejected.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 780 F.3d 1267 and reproduced at Pet.App.1 19. The district court's opinion is unpublished and is reproduced at Pet.App.22-32.

JURISDICTION

The Ninth Circuit issued its opinion on March 24, 2015, and denied a timely petition for rehearing on June 1, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §213, and DOL's regulations, 29 C.F.R. §779.372, are reproduced in the appendix to this brief. App.1a-28a.

STATEMENT OF THE CASE

A. Background on the FLSA and Its Many Exemptions for Salespeople

1. Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a). The statute's declared objectives were "to improve ... the standard of living of those who are now undernourished, poorly clad, and ill-housed," and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." S. Rep. No. 75-884, at 3-4 (1937).

The FLSA's objectives were modest. It was designed to establish "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.* at 3. The Act thus proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule requiring employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. *See* 29 U.S.C. §§206, 207, 212. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorney's fees. *Id.* §216(b).

From the beginning, the FLSA included a number of exemptions for certain types of employers and employees. *See id.* §213(a), (b). Those exemptions reflect both fundamental business realities and the intuitive proposition that not all employees are best compensated in the same way. Some exemptions broadly cover an entire industry, such as the exemptions for all employees of certain rail and air carriers, *id.* §213(b)(2), (3), and all employees engaged in the "catching, taking, propagating, harvesting ... or farming of any kind of fish," *id.* §213(a)(5). Others cover more specific activities, such as the exemption for employees "engaged in the processing of maple sap into sugar," *id.* §213(b)(15). But all of the exemptions recognize that a one-size-fits-all compensation regime may be unnecessary or even counterproductive for certain types of employers and employees.

2. One common-sense judgment reflected throughout the FLSA is Congress' recognition that

individuals who are engaged in sales or are paid on a commission basis are often ill-suited for an hourly compensation regime. The FLSA thus contains a number of exemptions from its mandatory overtime rules for salespeople and employees paid on a commission basis. For example, the FLSA exempts from its overtime-pay requirements "any employee employed ... in the capacity of outside salesman." 29 U.S.C. §213(a)(1). The statute also exempts certain employees of retail or service establishments who are paid on commission. *Id.* §207(*i*).

Those exemptions reflect the basic reality that salespeople are typically "more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097 That is, Congress has acknowledged that it is both common and reasonable for salespeople to be compensated based on their *success at selling*, rather than the sheer number of hours worked. This Court has similarly recognized that salespeople are "hardly the kind of employees that the FLSA was intended to protect." *See, e.g.*, *Christopher*, 132 S. Ct. at 2173.

B. The "Salesman, Partsman, or Mechanic" Exemption for Automobile Dealerships

This case addresses the scope of one of the FLSA's many exemptions for salespeople. Specifically. the FLSA provides that the overtime-pay requirements do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." 29 U.S.C. §213(b)(10)(A);

Pub. L. No. 89-601, §209(b), 80 Stat. 830, 836 (1966). In other words, an employee of a car or truck dealership is exempt from the mandatory overtime rules if he or she: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

Section 213(b)(10)(A) has its origins in an earlier, broader FLSA provision that exempted "any employee" of a car dealership from the overtime-pay requirements. 29 U.S.C. §213(a)(19) (1964); Pub. L. No. 87-30, §9, 75 Stat. 65, 73 (1961). By the mid-1960s, however, Congress concluded that it was not appropriate for *every* dealership employee to be treated as exempt. Dealerships have a wide array of employees, many of whom perform functions that are indistinguishable from other non-exempt employees. For example, there is no reason why a janitor or secretary working at an automobile dealership should be compensated differently from a janitor or secretary employed elsewhere.

In 1965, Congress considered legislation to amend the blanket exemption for dealership employees. The initial proposal would have eliminated the automobile dealership exemption altogether. *See* H.R. 8259, 89th Cong., §305 (as introduced in House, May 18, 1965). But Congress quickly concluded that this proposal went too far in the other direction. Dealerships' core sales and service employees were generally well-compensated and/or worked on commission, and forcing those employees into the FLSA's mandatory overtime regime would have made little sense in terms of the broader purposes of the statute.

Congress thus decided to narrow the dealership exemption rather than repeal it. In the final legislation, Congress retained the exemption for core dealership employees, including "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pub. L. No. 89-601, §209(b), 80 Stat. at 836. By contrast, employees who primarily performed support services—such as janitors, cashiers, porters, and secretaries—would no longer be exempt.

C. DOL's Shifting Interpretations of Section 213(b)(10)(A)

1. In 1970, the Secretary of Labor promulgated interpretive regulations that sought to define several of the key terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971).[1] DOL defined a "salesman" as "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of [automobiles]." *Id.* §779.372(c)(1). It also defined a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts," *id.* §779.372(c)(2), and a "mechanic" as "any employee primarily engaged in doing mechanical work ... in the servicing of an automobile ... for its use and operation as such," *id.* §779.372(c)(3).

DOL further asserted that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves

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[1] DOL asserted that the APA's notice-and-comment procedures were inapplicable because "these are interpretive rules." 35 Fed. Reg. 5856, 5895-96 (1970).

primarily engaged in the work of a salesman, partsman, or mechanic ... are not exempt under [§213(b)(10)]." *Id.* §779.372(c)(4). DOL believed that service advisors should be deemed non-exempt even though "such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." *Id.*

In the years after DOL promulgated this interpretive regulation, every court to consider the issue rejected the agency's conclusion that service advisors were non-exempt.[2] In *Deel Motors*, for example, DOL advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not *personally* service vehicles. *See Deel Motors*, 475 F.2d at 1097-98. But the Fifth Circuit rejected that view based on both the text and purpose of the exemption. As a textual matter, the court concluded that service advisors were plainly "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And, in considering the exemption's purpose, the Fifth Circuit noted that "service salesmen are functionally similar to the mechanics and partsmen who service the

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[2] *See, e.g.*, *Deel Motors*, 475 F.2d at 1097-98; *Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678, at *2 (D. Neb. Feb. 8, 1977); *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table); *Brennan v. Import Volkswagen*, No. W-4982, 1975 WL 1248, at *3 (D. Kan. Oct. 21, 1975).

automobiles." *Id.* at 1097 All of those employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salespeople who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.*

2. Within a few years of the Fifth Circuit's decision in *Deel Motors*, DOL backtracked from the position advanced in its 1970 interpretive regulations. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be treated as exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403, at *1 (July 28, 1978) ("1978 DOL Letter") (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).

Similarly, DOL's 1987 Field Operations Handbook instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj ("DOL 1987 Field Operations Manual"). The Handbook explained that "two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits)" have construed the exemption to cover

service advisors. *Id.*[3] The Handbook acknowledged that "[t]his policy ... represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

Despite those clear (and clearly correct) decisions to acquiesce after multiple courts had rejected DOL's position, the 1970 interpretive regulations with the now-repudiated interpretation of §213(b)(10)(A) remained on the books. In 2008, DOL initiated a rulemaking proceeding to update its regulations so that, *inter alia*, they reflected the view embraced in the Secretary's 1978 Letter and the 1987 Field Operations Handbook. *See Updating Regulations Issued Under the Fair Labor Standards Act*, 73 Fed. Reg. 43,654 (2008). As DOL explained, "[u]niform appellate and district court decisions ... hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *N. Bros. Ford*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

3. In 2011, however, DOL changed course yet again. It issued a final rule that neither adopted the proposed regulation nor brought the regulation into

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[3] In addition to the Fifth Circuit's decision in *Deel Motors*, the Sixth Circuit had summarily affirmed a district court decision finding service advisors to be exempt under §213(b)(10)(A). *See N. Bros. Ford*, 1975 WL 1074, at *3, *aff'd sub nom. Dunlop*, 529 F.2d 524.

line with the governing case law *See Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832, 18,859 (2011). Instead, DOL maintained the 1970 regulation's definition of "salesman," *see* 29 C.F.R. §779.372(c)(1), but simultaneously eliminated the more extensive discussion of service advisors included in that earlier regulation, *see* 76 Fed. Reg. at 18,859. In its brief explanation accompanying the final rule, DOL merely repeated its position from the 1970 regulation that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838.

Even though DOL identified no change in the statute or the marketplace, or any other intervening circumstances, the agency abandoned the position reflected in the Secretary's 1978 Letter and 1987 Field Operations Manual, and returned to its earlier and repudiated view that service advisors are not exempt, while simultaneously eliminating much of the reasoning that initially supported that long-discarded view. In short, despite having advised the industry for over 30 years that service advisors could be treated as exempt, DOL reversed field and returned to a position that the agency had advocated unsuccessfully in the early 1970s, while excising some of its supporting reasoning.

D. Respondents' Complaint and the District Court's Decision

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Respondents are current and former employees of

Petitioner who worked at the dealership as "service advisors." On September 18, 2012, Respondents filed a complaint alleging several violations of the FLSA and the California Labor Code.

The complaint alleges that, as service advisors, Respondents would meet and greet car owners as they entered the service area; evaluate customers' service and repair needs; suggest services to be performed on the vehicle to address the customers' complaints; solicit supplemental services to be performed (such as preventative maintenance); prepare price estimates for repairs and services; and inform the owner about the status of the vehicle. J.A.40-41. In short, Respondents performed sales activities that were integral to the servicing of vehicles at the dealership. And, like countless other salespeople in both car dealerships and other businesses, Respondents were paid on a commission basis; the more services they sold, the higher their commissions would be. *Id.*[4]

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them overtime compensation for that excess time. J.A.42-44. While remaining studiously vague on the details, Respondents seek "time-and-a-half" damages on top of the commissions they were paid. Petitioner moved to dismiss the FLSA claims on the ground that Respondents were exempt employees under 29 U.S.C. §213(b)(10)(A).

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[4] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships pay service advisors solely on a commission basis.

On January 25, 2013, the district court granted Petitioner's motion to dismiss the FLSA claims, holding that Respondents were clearly covered by the exemption in §213(b)(10)(A). Pet.App.25-29. The district court began by noting that several other courts "have applied this exemption to Service Advisors." Pet.App.26 (citing *Deel Motors*, 475 F.2d at 1097; *Walton*, 370 F.3d at 453).

The district court acknowledged that DOL had stated in 2011 that §213(b)(10)(A) did not apply to service advisors, but refused to defer to DOL's interpretation because it was objectively unreasonable. Pet.App.28-29. The court agreed with the Fourth and Fifth Circuits that DOL's interpretations were an "impermissibly restrictive construction of the statute." Pet.App.29 (quoting *Walton*, 370 F.3d at 452). Because "Service Advisors ... are functionally equivalent to salesmen and mechanics and are similarly responsible for the 'selling and servicing' of automobiles," the district court concluded that it would be "unreasonable" to carve those employees out of the exemption. *Id.* The court did not believe that "Congress intended to treat employees with functionally similar positions differently." *Id.* (quoting *Deel Motors*, 475 F.2d at 1097-98). The court thus dismissed Respondents' claim for overtime under the FLSA on the ground that they were exempt under §213(b)(10)(A).[5]

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[5] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims. Pet.App.31.

E. The Ninth Circuit's Decision

The Ninth Circuit reversed in relevant part, holding that service advisors who work at a car dealership are not exempt under §213(b)(10)(A) from the FLSA's overtime-pay requirements. Pet.App.19.

The panel relied heavily on the purported canon of construction that "[t]he FLSA is to be construed liberally in favor of employees," and "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)). The court explained that DOL's "interpretation accords with the presumption that the §213 exemptions should be construed narrowly." Pet.App.11. Because the statute does not define "salesman, partsman, or mechanic," and does not explicitly mention "service advisors," the Ninth Circuit could not "conclude that service advisors ... are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'" Pet.App.7 (second alteration in original) (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

The Ninth Circuit also disagreed with the district court's refusal to defer, concluding that DOL had reasonably interpreted an ambiguous FLSA exemption. The court believed that there were two "plausible" interpretations of the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pet.App.7. Under the first interpretation, a service advisor is a "salesman ... primarily engaged in ... servicing automobiles" and is thus exempt. *Id.* Under the second interpretation, which the Ninth Circuit characterized as "at least as plausible," the nouns in

the statute would be interpreted in a "more cabined" way: "a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars." *Id.* Under that narrower interpretation, "[s]ervice advisors do none of those things; they sell services for cars." *Id.* The Ninth Circuit thus concluded that the exemption is ambiguous about whether it extends to service advisors. Pet.App.8.

Turning to *Chevron*'s second step, the Ninth Circuit upheld DOL's current interpretation of the exemption as reasonable. Pet.App.11-19. The court of appeals concluded that it was reasonable for DOL to read the exemption so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if they are "engaged in ... servicing automobiles." Pet.App.13-15.

The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11. But the court "respectfully disagree[d] with those decisions." *Id.* In particular, the panel rejected the other courts' conclusion that DOL's 1970 interpretation of §213(b)(10)(A) was "unduly restrictive." Pet.App.12-13. Those courts had held that DOL's interpretation was unreasonable because it disregarded the fact that a service advisor could be a "salesman ... primarily engaged in ... servicing automobiles." *See Walton*, 370 F.3d at 452; *Thompson*, 294 P.3d at 402.

The Ninth Circuit, however, concluded that DOL's regulation honored the disjunctive nature of the

phrase "salesman ... primarily engaged in selling or servicing automobiles." First, the court concluded that there was ambiguity as to whether the phrase "primarily engaged in selling or servicing" refers to the act of "*personally*" selling or servicing automobiles or instead to "the general business" of selling or servicing automobiles. Pet.App.12-14 (emphasis added). Second, the court identified as a potential ambiguity whether the word "salesman" was modified only by the gerund "selling" or was instead modified disjunctively by both gerunds, "selling" and "servicing." Pet.App.13-15. The court further noted that "[n]on-textual indicators of congressional intent, such as legislative history, are inconclusive." Pet.App.15.

The Ninth Circuit ultimately concluded that "there are good arguments supporting both interpretations of the exemption," but that "where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice." Pet.App.19. The court of appeals thus held that Respondents were not exempt under 29 U.S.C. §213(b)(10)(A) and reversed the district court's dismissal of Respondents' claims.[6]

SUMMARY OF ARGUMENT

The FLSA exempts from its overtime-pay requirements "any salesman ... primarily engaged

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[6] The Ninth Circuit affirmed the district court's dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. *See* Pet.App.3-4 n.2. Because it reinstated Respondents' federal overtime-pay claim, the Ninth Circuit vacated the district court's dismissal of Respondents' state-law claims for lack of jurisdiction. *See id.*

in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Because service advisors are both salesmen and primarily engaged in servicing automobiles, they are exempt. That common-sense interpretation is confirmed by the statute's plain language, basic rules of grammar, the FLSA's underlying purposes, and a practical understanding of service advisors' role within an automobile dealership. The Ninth Circuit's departure from a previously unbroken line of precedent, in which DOL had acquiesced for over 30 years, upsets the long-settled expectations of both dealerships and their employees and exposes employers to drastic retroactive liability, while doing nothing to advance the FLSA's purposes.

I. Section 213(b)(10)(A) unambiguously covers service advisors because they are "salesm[e]n ... primarily engaged in selling or servicing automobiles." The phrase "primarily engaged in selling or servicing" is disjunctive, and both gerunds—"selling" and "servicing"—can sensibly be applied to the noun "salesman." Limiting the exemption to salesmen primarily engaged in selling, but not servicing, automobiles flatly contradicts the statute, which plainly broadens the exemption. The exemption applies not just to those primarily engaged in selling, but also to those primarily engaged in servicing.

Basic rules of grammar reinforce that result by dictating that each element in a disjunctive list be given meaning when it is sensible to do so. Moreover, the statute further emphasizes the breadth of the exemption by extending it to "*any* salesman." The word "any" carries with it an "expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). There

is no question that service advisors are salesmen. And because they sell the servicing of automobiles, they are plainly salesmen *engaged in* servicing automobiles. Indeed, it would be nonsensical to suggest that a salesman primarily engaged in the selling of automobile servicing is engaged in *neither* selling *nor* servicing automobiles. Yet that is the position embraced by Respondents and DOL.

The Ninth Circuit identified two potential "ambiguities," neither of which withstands scrutiny. First, the Ninth Circuit found it reasonable to read into the statute a restrictive modifier demanding that an exempt employee *personally* service automobiles in the same manner as a mechanic. The statutory text, of course, contains no such requirement. For example, a service advisor who sells a customer a package of services that includes the installation of new brake pads is engaged in servicing automobiles even though this employee does not personally change the brake pads. That the Ninth Circuit could create ambiguity only by adding the word "personally" to the text only underscores that the statute as written is unambiguous. Worse still, the Ninth Circuit's introduction of the limiting modifier "personally" would improperly deprive the word "partsman" of any meaning. Partsmen are no more (or less) directly involved in the hands-on servicing of automobiles than service advisors, yet the statute plainly contemplates that partsmen are exempt. Like service advisors, partsmen are primarily engaged in servicing automobiles without directly doing the servicing themselves.

Second, despite the clearly disjunctive statutory language, the Ninth Circuit concluded that the exemption could be reasonably construed so that the noun "salesman" was modified only by the gerund "selling," but not the gerund "servicing." That purported ambiguity, however, would effectively read out of the statute the phrase "*any* salesman ... primarily engaged in ... *servicing automobiles*." A one-to-one mapping of nouns to gerunds might make sense if there were the same number of nouns and gerunds. But the exemption at issue here contains three nouns and only two gerunds, making it mathematically impossible to link the nouns and gerunds on a one-to-one basis.

II. The unambiguous language of §213(b)(10)(A) obviates the need to consider any issue of agency deference, but any deference to DOL's interpretation would be misplaced for multiple reasons. First, DOL's view is patently unreasonable. DOL's interpretation is an "impermissibly restrictive construction of the statute" that is "flatly contrary to the statutory text." *Walton*, 370 F.3d at 451-52. Under the guise of interpreting the word "salesman," DOL's regulations in fact interpret the phrase "salesman ... primarily engaged in selling or servicing automobiles" in a way that denies any meaning to a portion of that phrase—"salesman ... engaged in ... *servicing* automobiles."

Second, treating service advisors as non-exempt makes little sense in the context of the broader statutory scheme. The FLSA contains many provisions that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid on a commission basis. *See,*

e.g., 29 U.S.C. §§207(*i*), 213(a)(1). Those exemptions reflect the basic reality that salespeople, including service advisors, "are more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097 Forcing dealerships to pay overtime to service advisors under the one-size-fits-all FLSA regime is a misguided attempt to fit a square peg into a round hole because salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher*, 132 S. Ct. at 2173.

Finally, DOL's complete lack of justification for its about-face in the 2011 interpretive regulation should be fatal to any plea for deference. In the first few years of DOL's 1970 interpretation, every court to consider the issue rejected DOL's position. DOL acquiesced in those decisions in the Secretary's 1978 Letter and the 1987 Field Operations Manual, and for over 30 years service advisors and dealerships operated under mutually beneficial compensation plans in good-faith reliance on both judicial precedent and administrative guidance. Then, after promising to formalize its change in position, DOL instead reverted to its long-discarded and oft-rejected view Rather than carefully explaining its re-reversal or addressing the serious reliance interests engendered by its flip-flop-flip, DOL actually trimmed its already-thin justification for treating salesmen primarily engaged in the servicing of automobiles as non-exempt. There is no basis for deference to DOL under these circumstances.

III. If allowed to stand, the Ninth Circuit's erroneous interpretation of §213(b)(10)(A) would have far-reaching implications for the nation's 18,000 franchised car dealerships and 45,000 service

advisors. That interpretation would result in a wholesale reworking of the service advisor position, harming dealerships and service advisors alike.

This Court has been justifiably skeptical of attempts by plaintiffs to impose significant retroactive liability for settled industry practices that had long been viewed as outside the scope of the FLSA. *See, e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19. Here, the longstanding industry practice was encouraged by administrative guidance for over 30 years. This Court should reject Respondents' attempts to impose massive retroactive liability on employers for compensation arrangements that have been repeatedly—and correctly—approved for decades by courts nationwide.

ARGUMENT

I. Service Advisors Are Unambiguously Exempt Because They Are Salesmen Primarily Engaged In Servicing Automobiles.

Service advisors are unambiguously exempt from the FLSA's overtime-pay requirements. The statute exempts "any salesman ... primarily engaged in selling or servicing automobiles," and service advisors are salesmen primarily engaged in servicing automobiles. It is unsurprising that every court to consider this issue, save the Ninth Circuit, has found service advisors to be exempt.

A. Service Advisors Are Exempt Under the Plain Language of Section 213(b)(10)(A).

1. The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic

primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." *Id.*

The question is thus whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* Service advisors are unquestionably "salesmen"; they sell services to the dealership's customers. Respondents evaluate customers' service and repair needs, suggest services to address specific problems, prepare cost estimates, and offer supplemental services such as preventative maintenance. *See* J.A.40-41. All of those activities facilitate the customers' purchase of the dealership's service offerings. Respondents are plainly salesmen.

And Respondents are just as plainly "primarily engaged in ... servicing automobiles." Most automobile dealerships offer service and sales, and Respondents are the salesmen dedicated to the servicing side of the business. They help diagnose the need for service, provide information about optional services, and, having formed a relationship with the customer, help to ensure the customer is satisfied with the service received. As Respondents' own complaint makes clear, service advisors are integral to the process of servicing vehicles at the dealership. *See id.* Thus, under the unambiguous text of §213(b)(10)(A), service advisors are exempt because they are

"salesmen" who are "primarily engaged in ... servicing automobiles."

2. Several powerful grammatical and textual indicators confirm this straightforward reading of the statutory text. First, it is a fundamental rule of grammar that, when a sentence has multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked to each gerund as long as that noun-gerund combination has a sensible meaning. *See. e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise...."); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) ("The words ... are written in the disjunctive, implying that each has a separate meaning.").

Here, §213(b)(10)(A) specifically exempts "any salesman ... primarily engaged in selling *or* servicing automobiles." There is no question that the term "or" makes the phrase "primarily engaged in selling or servicing" disjunctive. *See Thompson*, 294 P.3d at 402 ("The use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic' who [is] primarily engaged in either of these duties."). And in the context of an exemption limited by a requirement that the employee be primarily engaged in a particular activity or activities, there is no question that the use of the disjunctive broadens the exemption. An exemption provided to employees primarily engaged in X or Y is broader than one given only to employees primarily engaged in X. Thus, as long as both X and

Y can be sensibly applied to a noun, then the broader meaning promised by the use of the disjunctive must be honored.

There is little doubt here that both gerunds can sensibly be applied to the noun "salesman." There are a variety of salespeople at automobile dealerships. Some salespeople are "engaged in selling ... automobiles." But other salespeople play an integral role in the service process. In particular, service advisors engage in classic sales functions just like other salespeople, but they sell services rather than automobiles. *See* J.A.40-41 (describing Respondents as employees who "work on a pure commission basis" and "solicit and suggest[] that certain service[s] be conducted on" cars that come in for servicing). They are thus "salesmen ... primarily engaged in ... servicing automobiles." Because both parts of the disjunctive phrase "engaged in selling or servicing automobiles" can be sensibly applied to the noun "salesman," fundamental rules of grammar dictate that both parts of the phrase be given their plain meaning.

At the very least, the entire phrase "primarily engaged in *selling or servicing* automobiles" applies to service advisors. Service advisors are certainly not primarily engaged in any activity *other than* selling or servicing. And they are not engaged in selling or servicing anything other than automobiles. In fact, they are engaged in the selling of the servicing of automobiles. It would be nonsensical to suggest that an individual who is primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles.

If the exemption applied only to salesmen primarily engaged in selling automobiles, it might have made sense to argue that service advisors are non-exempt because they sell services for automobiles rather than the automobiles themselves. But given that the exemption covers both selling and servicing, it makes no sense to hold that service advisors are non-exempt because they are primarily engaged in selling services and not automobiles.[7] The notion that service advisors could be non-exempt because they are too involved in servicing makes nonsense of Congress' decision to employ the disjunctive.

The breadth of the exemption is further underscored by its exemption of "*any* salesman." This Court has repeatedly emphasized that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (quoting Webster's Third New Int'l Dictionary 97 (1976)); *see also Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002). Congress' use of the word "any" in §213(b)(10)(A) makes clear that it intended to exempt *all* salesmen working in an automobile dealership, as long as they were "primarily engaged in selling or servicing automobiles." Service advisors fall

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[7] Similarly, if an employee spent 40% of his time engaged in selling automobiles, 30% of his time engaged in selling servicing, and 30% of his time doing something else, he would still be primarily engaged in selling or servicing automobiles, even though he might not be primarily engaged in one or the other. Congress' use of the disjunctive necessarily broadens the exemption.

comfortably within that category of exempt employees.

3. Given the clarity of the statutory text, it is unsurprising that every court to consider this issue—until the Ninth Circuit in the decision below—concluded that service advisors were exempt. For example, in *Walton*, the Fourth Circuit held that service advisors fall within the plain text of the FLSA's overtime-pay exemption. The *Walton* plaintiff's job duties were identical to Respondents' job duties here: he would "greet customers, listen to their concerns about their cars, write repair orders, follow-up on repairs. ... keep customers informed about maintenance, [and] ... suggest to customers additional services...." *Walton*, 370 F.3d at 449. The Fourth Circuit correctly recognized that service advisors are "primarily engaged in servicing automobiles" because they are an "integral part of the dealership's servicing of automobiles" and are the "first line ... service sales representative[s]." *Id.* at 452-53.

Similarly, in *Deel Motors*, the Fifth Circuit held that service advisors were exempt from the FLSA. 475 F.2d 1095. In that case, too, the court recognized that service advisors perform functions that fall squarely within the statutory exemption. *Id.* at 1097-98. And, in *Thompson*, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that the §213(b)(10)(A) exemption covers service advisors. 294 P.3d at 402. The court found no ambiguity in the relevant statutory text because a "plain, grammatical reading of [§213(b)(10)(A)] makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling

vehicles." *Id.* As those courts—and others[8]—have uniformly recognized, service advisors are exempt under a straightforward textual interpretation of §213(b)(10)(A).

B. The Ninth Circuit's Reasons for Finding Ambiguity in the Statutory Text Do Not Withstand Scrutiny.

The Ninth Circuit identified two bases for perceiving ambiguity where every other court saw clarity. Neither withstands scrutiny.

1. Service advisors need not personally service automobiles to be exempt.

First, the Ninth Circuit offered an alternative interpretation of §213(b)(10)(A) in which the word "personally" was injected into the statute to modify "selling" and "servicing." *See* Pet.App.12-13 (statute can be interpreted to exempt only "any salesman, partsman, or mechanic primarily [and personally] engaged in selling or servicing automobiles" (alterations in original)). Under that view, because a service advisor does not personally service vehicles in the same manner as a mechanic—*i.e.*, does not personally rotate the tires or change the transmission fluid—he cannot be "primarily engaged in ... servicing automobiles."

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[8] The federal district courts that have addressed this issue have also uniformly concluded that the exemption in §213(b)(10)(A) applies to service advisors at car dealerships. *See, e.g., Yenney*, 1977 WL 1678; *N. Bros. Ford*, 1975 WL 1074, *aff'd sub nom. Dunlop*, 529 F.2d 524; *Import Volkswagen*, 1975 WL 1248. The district court here likewise held that service advisors were exempt. *See* Pet.App.29.

The principal and obvious problem with that construction is that the word "personally" does not appear in the statute Congress enacted. The notion that an exempt employee must personally service automobiles requires adding a restrictive modifier that is absent from the statutory text. Needless to say, creative redrafting of statutory language is strongly disfavored. This Court "ordinarily resist[s] reading words ... into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). And if a word must be added to a statute to render it ambiguous, that is a sure sign that the text as originally drafted is clear. Under the statutory text as written, a service advisor who sells services to a customer is *primarily engaged in* servicing even though he does not get under the hood and personally perform those services.

The injection of a new word into the statute alone would be problematic enough, but the Ninth Circuit and DOL would add one word to the statute only to render another word that is actually there superfluous. Partsmen are plainly exempt employees under the statute, but they do not personally sell or personally service automobiles the way mechanics do. Instead, as DOL itself has recognized, partsmen are "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2); *see also* 112 Cong. Rec. 20,502 (1966) (statement of Sen. Birch Bayh) (describing a partsman as one who "classifies, shelves and dispenses parts used by mechanics and sold to customers who come into establishments to make purchases").

The Ninth Circuit had no answer at all to the fact that its interpretation of "engaged in selling or servicing automobiles" would effectively write partsmen out of the statute. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statute or regulation must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). It cannot seriously be contended that the exemption covers only partsmen who *personally* service automobiles the way a mechanic does, for that is nearly a null set. Even DOL's regulations do not attempt to impose such a requirement. *See* 29 C.F.R. §779.372(c)(2) (partsman defined as any employee "primarily engaged in requisitioning, stocking, and dispensing parts").

Partsmen fall within the express terms of the exemption even though they are only engaged in the *process* of servicing automobiles and do not join the mechanics in directly servicing them. The same is true of service advisors. Both the partsman and the service advisor are integral to the servicing process even though neither employee is under the hood performing the service. Indeed, if anything, service advisors—who diagnose problems, recommend service solutions, and ensure the customer is satisfied with the service—are arguably more personally involved in servicing than the plainly exempt partsmen. No canon of construction permits interpreting the concept of "servicing" broadly for partsmen and narrowly for salesmen. *See, e.g.*, *FCC v. AT&T*, 562 U.S. 397, 408 (2011) ("identical words and phrases within the same statute should normally be given the same meaning" throughout the statute).

In all events, even if the Ninth Circuit were correct to read the word "personally" into the statute, that modifier would presumably apply to the entire phrase "primarily engaged in ... servicing automobiles" rather than just the phrase "servicing automobiles." For all the reasons noted above, there is no question that service advisors (like partsmen) personally are primarily *engaged in* the servicing of automobiles even though they do not personally get under the hood. *See supra* Part I.A.

In short, while the statute as redrafted by the Ninth Circuit creates ambiguity over partsmen, the statute Congress actually drafted unambiguously exempts both partsmen and service advisors even though they do not personally service automobiles to the same degree as a mechanic. Both types of employees are *primarily engaged in servicing automobiles*, which is all the clear statutory text requires.

2. The exemption unambiguously covers salesmen engaged in either selling or servicing automobiles.

In its other attempt to conjure up ambiguity in the clear statutory text, the Ninth Circuit asserted that the exemption could be construed so that the noun "salesman" is modified exclusively by "selling," rather than by both gerunds disjunctively, "selling" or "servicing." Pet.App.13-15. This was also DOL's primary justification for depriving the phrase "salesman ... primarily engaged in ... servicing automobiles" of any meaning back in 1970. According to DOL, despite the statute's plainly disjunctive language, the exemption covers salesmen "engaged in

selling" cars, but not salesmen "engaged in servicing" them. *See* 76 Fed. Reg. at 18,838 (asserting that exemption is limited to "salesmen who sell vehicles and partsmen and mechanics who service vehicles").

The Ninth Circuit provided two stylized analogies that, in its view, highlighted this purported ambiguity. The Ninth Circuit first presented the sentence, "if my dogs or cats are eating or drinking, then I know not to pet them." Pet.App.14. In this sentence, it is clear from the context that both "eating" and "drinking" can apply to both "dog" and "cat." The court contrasted that sentence with the sentence, "if my dogs or cats are barking or meowing, then I know that they need to be let out." *Id.* It is equally clear from the context of this sentence that "barking" applies only to dogs and "meowing" applies only to cats. Reasoning by analogy, the Ninth Circuit concluded that the phrase "salesman, partsman, or mechanic primarily engaged in selling or servicing" could be understood as akin to either the "barking or meowing" sentence or the "eating or drinking" sentence, thereby resulting in ambiguity for DOL to fill.

There are two serious problems with the Ninth Circuit's examples and reasoning. First, rather than demonstrating any ambiguity. those examples simply underscore that context matters and can provide clear answers. Neither dog/cat example is actually ambiguous. The first illustrates the default grammatical rule that unless the disjunctive gerund is distinct to one of the disjunctive nouns, then the gerund modifies all the nouns to which it could apply. An effort to limit that phrase to eating dogs and

drinking cats would be nonsensical. Put differently, there is no ambiguity as to whether that phrase covers drinking dogs and eating cats. They are plainly covered. The second example demonstrates that the default rule can be overcome when the gerunds are by their nature limited to a particular noun. Meowing dogs and barking cats are not covered because there are no such animals. Once again, the phrase is unambiguous. But there is nothing oxymoronic or even anomalous about a salesman primarily engaged in the servicing of automobiles. That is exactly what 45,000 service advisors do, and they are unambiguously covered by the exemption. Based on context, the exemption here cannot possibly be interpreted so that only "selling," but not "servicing," modifies "salesman."

Second, the Ninth Circuit's reasoning is yet again devastated by the exemption's undeniable coverage of partsmen. Congress' inclusion of partsmen is fatal to the Ninth Circuit's theory that Congress intended to limit the application of each of the disjunctive gerunds to only one of the listed nouns. In the "dog-cat" analogy. the partsman is the figurative "horse" (or any other animal) in the sentence that confirms that the gerunds are more similar to generic "eating or drinking" than to species-particular "barking or meowing." Indeed, the FLSA exemption in §213(b)(10)(A) contains *three* nouns but only *two* gerunds, which makes it mathematically impossible to link the nouns to the gerunds on a one-to-one basis. Context matters, and the number and positioning of the nouns and gerunds make clear that a salesman—like a partsman or mechanic—can be "primarily engaged in ... servicing automobiles."

C. FLSA Exemptions Should Be Interpreted Fairly and Correctly, Not Narrowly or Broadly.

The Ninth Circuit buttressed its untenable interpretation of the statutory text by relying heavily on the purported canon of construction that "the FLSA is to be construed liberally in favor of employees," and that "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro*, 745 F.3d at 1256). Indeed, the Ninth Circuit effectively applied a clear statement rule, holding that employees must be treated as subject to the FLSA's overtime rules unless they "plainly and unmistakably" fall within an exemption. *Id.* (quoting *Solis*, 656 F.3d at 1083).

The purported canon of broad construction of the FLSA (and narrow construction of its exemptions) is just an FLSA-specific variant of the disfavored notion that courts should interpret remedial statutes broadly. *See, e.g., OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995) (describing broad-construction canon as "that last redoubt of losing causes"). But applying this misguided canon does nothing but guarantee extravagant results in FLSA cases. And it makes least sense of all when Congress has clearly and plainly manifested its intent to *narrow* the scope of the FLSA's protections through an exemption. The goal of a court interpreting a statute "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W Res. L. Rev. 581, 582 (1990).

In recent years, the Court has cited this anti-employer "canon" only in the course of *declining* to apply it. *See, e.g., Sandifer v. U.S. Steel*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher*, 132 S. Ct. at 2172 n.21 (canon does not apply to FLSA's definitions). It has been at least several decades, if not longer, since the Court has cited this canon as even a partial basis for ruling in favor of an FLSA plaintiff.

Even though this Court has largely disregarded the anti-employer canon, a number of lower courts—including the Ninth Circuit here—have seized upon this Court's dictum and used the outdated "canon" to interpret the FLSA in ways that tip the scales in favor of employees claiming to be covered by the statute. *See* Pet.App.11 (DOL's "interpretation accords with the presumption that the §213 exemptions should be construed narrowly"); *see also, e.g., Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008); *Miller v. Team Go Figure*, No. 3:13-CV-1509-O, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014); *Amendola v. Bristol-Myers Squibb*, 558 F Supp. 2d 459, 472 (S.D.N.Y 2008). The Court should take this opportunity to make clear to lower courts that this "last redoubt of losing causes" is no substitute for careful statutory interpretation. The FLSA and its exemptions should be construed neither narrowly nor broadly, but fairly and correctly.

II. DOL's Interpretation Is Profoundly Mistaken And Is Not Entitled To Deference.

Because the text of §213(b)(10)(A) unambiguously exempts service advisors, there is no reason for this

Court to consider whether DOL's wavering interpretation is entitled to deference. But even if the statute were less clear, DOL's interpretation would not be entitled to deference, both because it is unreasonable and because DOL has not adequately explained its revival of its long-discarded position nor adequately accounted for the reliance interests engendered during the three decades when DOL signaled that service advisors, like the rest of the dealership's salesforce and service teams, were exempt.

A. DOL's Interpretation Unreasonably Deprives a Key Portion of the Exemption of Its Plain Meaning.

Even if the Ninth Circuit were correct that there is some ambiguity in the text of §213(b)(10)(A), there would still be no basis for deferring to DOL's interpretation of the exemption. Unlike other subsections of the FLSA, Congress did not expressly delegate to DOL authority to interpret §213(b)(10)(A). *Compare, e.g.*, 29 U.S.C. §213(a)(1) (granting DOL authority to "define[] and delimit[] from time to time by regulations" the definition of "outside salesman"), *and id.* §213(b)(14) (granting DOL authority to define the phrase "area of production"), *with id.* §213(b)(10)(A) (no comparable grant of authority). DOL's 1970 and 2011 regulations are not legislative, but merely interpretive. *See Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984). Interpretive regulations, even when consistently applied, are accorded less deference than legislative regulations, and may be upheld by a court only if they "implement the congressional mandate in a

reasonable manner." *Walton*, 370 F.3d at 452; *see also Chevron*, 467 U.S. at 843-44; Pet.App.29 ("mere interpretation" is "accorded lower deference").

DOL's interpretation of §213(b)(10)(A) fails that test. All of the arguments for why the text of the exemption is unambiguous apply with equal, if not greater, force in explaining why DOL's interpretation is objectively unreasonable. As the Fourth Circuit has explained, DOL's interpretation is unreasonable because it is an "impermissibly restrictive construction of the statute" that is "flatly contrary to the statutory text." *Walton*, 370 F.3d at 451-52.

The principal problem with DOL's interpretive regulation is that it unreasonably defines "salesman" to include salesmen primarily engaged in *selling* automobiles, but not salesmen primarily engaged in *servicing* automobiles. DOL defines "salesman" as "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts *for sale of the automobiles, trucks, or farm implements* that the establishment is primarily engaged in selling." 29 C.F.R. §779.372(c)(1) (emphasis added).

That narrow regulatory definition is little more than an interpretive bait-and-switch. Under the guise of defining the word "salesman," DOL has in fact interpreted the entire phrase "salesman ... primarily engaged in selling or servicing automobiles." And, in doing so, the agency has unduly restricted the types of salesmen covered by the exemption to only those salesmen engaged in selling, but not servicing, automobiles. Even Respondents have recognized that "a salesman is one who sells something, making a

sale," Resp.BIO.18, yet DOL impermissibly defines "salesman" in a manner that reads out of the statute the second half of the disjunctive phrase "selling *or servicing* automobiles." Because DOL's regulation "unreasonably implements the congressional mandate," *Walton*, 370 F.3d at 452, and conflicts with the crystal-clear statutory text, it is entitled to no deference.

B. Treating Service Advisors As Exempt Is Consistent With the FLSA's Structure and Broader Purposes.

DOL's position must also be rejected as unreasonable because treating service advisors as non-exempt makes little sense in either the broader scheme of the FLSA or the broader scheme of a dealership's sales and service staff. The FLSA contains several provisions (in addition to §213(b)(10)(A)) that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid on a commission basis. *See, e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman").

Those provisions, as well as §213(b)(10)(A), reflect the basic reality that it is both common and reasonable for salespeople to be compensated based on their *success at selling*, rather than the sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*,

475 F.2d at 1098. Like countless other salespeople who are treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* at 1097 Forcing an employer to pay service advisors—who are quintessential salespeople—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *See, e.g.*, *Christopher*, 132 S. Ct. at 2173 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

That problem is particularly acute in cases like this and *Christopher*, when there is a belated effort to treat salespeople as exempt. Because their compensation is often driven by commissions, salespeople may work irregular hours and not keep meticulous records of how long they work. Based on their compensation, salespeople often keep closer track of their sales than their hours.

DOL's interpretation also forces dealerships to differentiate among their employees in ways that are both divisive and contrary to Congress' plain intent. Service advisors are in some sense a hybrid, since their job is to sell, but they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-exempt, there might be a boundary question on which DOL would be due some deference. But here DOL has seized on the fact that service advisors are a hybrid between two *fully exempt* categories as a ground for deeming them non-exempt. That interpretation

makes no sense and needlessly creates fissures among similar employees that Congress plainly did not intend.

Finally, forcing service advisors into the FLSA's mandatory overtime regime would not advance the core policy goals underlying the FLSA. As amici noted in their brief in support of the petition for certiorari, service advisors in several states within the Ninth Circuit earn an average of $75,769 per year, and the top 10% earn on average $105,583. NADA Cert. Amicus Br. 7 This is hardly a case that implicates the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life," S. Rep. No. 75-884, at 4.

C. DOL Failed to Adequately Justify Its Adoption of an Interpretation That Upsets the Long-Settled Expectations of Both Employers and Employees.

DOL's flimsy justification for reversing its interpretation of §213(b)(10)(A) in 2011 only compounds the unreasonableness of its position and highlights the inappropriateness of deference here. For over 30 years, service advisors and car dealerships have operated under mutually beneficial compensation plans in good-faith reliance on DOL's repeated assertion that service advisors are exempt. *See* 1978 DOL Letter, 1978 WL 51403, at *1 (service advisors exempt from FLSA as long as their sales are primarily for non-warranty service); DOL 1987 Field Operations Manual, 24L04-4 (instructing DOL employees to "no longer deny the [overtime] exemption for" service advisors). After proposing in 2008 to formalize that longstanding view, DOL in 2011

reverted to its discredited and discarded view from 1970. In doing so, it did not offer a new interpretation that explained the changes in policy and accounted for reliance interests. Rather, in reverting to its earlier view, DOL relied on the same countertextual reading of the statute that the courts had long rejected, and actually subtracted some of its earlier reasoning. *See* 76 Fed. Reg. at 18,838 (limiting exemption to "salesmen who sell vehicles and partsmen and mechanics who service vehicles," and removing language explaining treatment of service advisors).

DOL's specious justification for its (most recent) change of position falls far short of the type of reasoned decisionmaking expected of an agency before it upends a policy that "has engendered serious reliance interests." *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009); *see also Smiley v. Citibank (S.D.)*, 517 U.S. 735, 742 (1996) (a "change that does not take account of legitimate reliance on prior interpretation[s] ... may be 'arbitrary, capricious [or] an abuse of discretion'").

In promulgating its 2011 interpretive rule, DOL made no attempt to justify its disregard of the legitimate reliance interests of employers and employees. Indeed, the agency gave no weight whatsoever to those reliance interests. DOL also failed to identify a single change in the FLSA, the automobile marketplace, or industry practices that would have justified an abrupt about-face after 30 years of acquiescence in the lower courts' treatment of service advisors as exempt. Rather than add language explaining the change and accounting for reliance interests, DOL actually *stripped* from the text of its

2011 regulation the agency's earlier justifications for not exempting service advisors. *Compare* 29 C.F.R. §779.372(c)(4) (1971) (1970 DOL rule explaining why service advisors are not exempt), *with* 29 C.F.R. §779.372(c) (2012) (deleting any specific reference to service advisors' status). There is no basis for deferring to DOL's latest reversion under circumstances like these.

III. If Allowed To Stand, The Ninth Circuit's Erroneous Decision Would Produce Far-Reaching Consequences For Both Dealerships And Service Advisors.

Affirming the decision below would disrupt decades of settled expectations and open employers to substantial retroactive liability, something this Court has been loath to do, particularly in the FLSA context. The Ninth Circuit's decision has the potential to cause serious harm to automobile dealerships and service advisors alike, without any countervailing benefits in terms of the FLSA's goals.

The scope of the FLSA exemption under §213(b)(10)(A) is of tremendous practical significance to the automobile industry nationwide. The nation's 18,000 franchised car dealerships employ an estimated 45,000 service advisors. Based on decades of settled precedent treating those employees as exempt—and DOL's multiple assurances of the same, *see* 1978 DOL Letter, 1978 WL 51403, at *1; DOL 1987 Field Operations Manual, 24L04-4—many dealerships have offered compensation packages based primarily on sales commissions rather than hourly wages. Yet the Ninth Circuit has now

concluded that those longstanding compensation arrangements have been unlawful from the start.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 132 S. Ct. at 2168 (quoting *Yi v. Sterling Collision Centers*, 480 F.3d 505, 510-11 (7th Cir. 2007)). The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability (including back pay and double damages). *See, e.g., id.* at 2167 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt ... transgressed the FLSA"); *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *see also Yi*, 480 F.3d at 510 (rejecting FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing"). And here this longstanding industry practice was encouraged by DOL in both the Secretary's 1978 Letter and the 1987 Field Operations Handbook.

Those reliance concerns are at their zenith in cases like this and *Christopher*, where plaintiffs seek to have employees who were actually paid on a commission basis retroactively reclassified as non-

exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 132 S. Ct. at 2173 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). This problem is evident in Respondents' studious ambiguity of the damages they seek. Having received commissions based on their sales, they are in no position to ask for 150% of those commissions, but any effort to attribute a different type of compensation to previously commissioned salespeople is artificial. And in all events, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily accepted, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in DOL's approach. Under the approach adopted by every other court to consider the issue, all core sales and service employees at a dealership are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not other core salespeople (or others engaged in providing services, such as partsmen or mechanics), a huge windfall. Those windfalls cannot help but prove to be divisive. Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also having to deal with

anomalous divisions among their core employees going forward.

* * *

At bottom, DOL's (and the Ninth Circuit's) attempt to bring service advisors within the FLSA regime after more than three decades of treating them as exempt is a burdensome "solution" in search of a non-existent "problem." Treating service advisors as non-exempt would do nothing to advance the purposes of the FLSA, yet would impose significant and unnecessary burdens and costs on dealerships and service advisors alike. The Ninth Circuit's novel and unprecedented interpretation of §213(b)(10)(A) works a fundamental, unnecessary, and unauthorized change in the law and should be reversed.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415

Counsel for Petitioner

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STATUTORY APPENDIX

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29 U.S.C. § 213
EXEMPTIONS

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than

seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101–157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five

hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than

four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93–259, §23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93–259, §10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93–259, §§9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including

consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93–259, §11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry. eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93–259, §21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95–151, §14(b), Nov 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment

primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during

his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93–259, §§15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection

activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95–151, §5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93–259, §10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub. L. 95–151, §§6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if—

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5–1990 for scrap paper balers and Standard ANSI Z245.2–1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper

baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the

Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross

volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by. or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday. and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

29 C.F.R. § 779.372
NONMANUFACTURING ESTABLISHMENTS WITH CERTAIN EXEMPT EMPLOYEES UNDER SECTION 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to "any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling

automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of the term "employed by" is contained in §§779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm

implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning,

painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishment's annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

Supreme Court, U.S.
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In the Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

KEVEN STEINBERG
THOMPSON, COE & O'MEARA
12100 Wilshire Blvd.
Suite 1200
Los Angeles, CA 90025
(310) 954–2362

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(215) 746–2297
sbibas@law.upenn.edu

QUESTIONS PRESENTED

Under *Chevron*'s two-step framework:

1. Does the Fair Labor Standards Act's statutory overtime-pay exemption for automobile dealership "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles," 29 U.S.C. § 213(b)(10)(A), unambiguously apply or not apply to service advisors?

2. Is the Department of Labor's 2011 notice-and-comment regulation, 29 C.F.R. § 779.372(c), which concluded that service advisors fall outside the salesman/partsman/mechanic exemption, a permissible construction of the statute?

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees nonexempt employees time-and-a-half pay for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). From 1961 to 1966, all automobile dealership employees were exempt from overtime pay. In 1966, Congress repealed this blanket exemption and replaced it with one limited to three enumerated types of employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A).

Exercising its delegated rulemaking authority, in 2011 the Department of Labor (DoL) promulgated a notice-and-comment regulation providing that a fourth type of dealership employee, service advisors, does not qualify for the exemption. 29 C.F.R. § 779.372(c). After considering each comment it received, DoL noted that salesmen sell automobiles, while partsmen and mechanics service automobiles. Service advisors do not "sell[] or servic[e] automobiles, trucks, or farm implements." They write up repair estimates and work orders *before* the servicing begins.

Petitioner seeks to shoehorn service advisors into the contrived, nonexistent category of "salesmen primarily engaged in servicing automobiles." Br. 22, 37. To do so, petitioner stretches the statutory term "servicing" beyond automotive manual labor to employees who are "integral to the servicing process," whatever that means. Br. 1, 30; *accord id.* at 13, 23, 25, 27. Petitioner offers its textual analysis with hardly a dictionary definition (at 26), its supposed "fundamental rule of grammar" (at 24) with

nary a grammatical authority, and its administrative-law argument with only passing reference (at 36–37) to *Chevron*. But dictionaries, grammarians, interpretive canons, an opinion of this Court by Chief Justice John Marshall, computer searches of millions of books, and administrative-law authorities are all to the contrary, not to mention more than a hundred analogously worded statutes that are appended to this brief. DoL's notice-and-comment regulation is not only permissible at *Chevron* step two, but unambiguously required by the statute at *Chevron* step one.

STATEMENT

A. Statutory and Regulatory Background

1. *The FLSA's Overtime-Pay Requirement and Its Specific Exemptions.* The FLSA promotes a "'general maximum working week'" and combats "the evil of 'overwork' as well as 'underpay.'" *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 578 (1942) (quoting President Franklin Roosevelt). Thus, the statute requires employers to pay time-and-a-half for hours worked beyond forty per week, except to exempt employees. 29 U.S.C. § 207(a)(1); *see also id.* §§ 207, 213.

2. *The 1961 Blanket Dealership Exemption.* In 1961, Congress enacted a blanket exemption from the FLSA's minimum-wage and overtime provisions for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)). Thus, from 1961 to 1966, all automobile dealership employees were exempt from

the overtime-pay requirement, whether they were salesmen, receptionists, managers, mechanics, partsmen, accountants, service advisors, dispatchers, lot boys, parts runners, car washers, or janitors.

3. *The 1966 Salesmen/Partsmen/Mechanics Exemption.* In 1966, Congress repealed the blanket dealership exemption from the minimum wage and narrowed it as to overtime pay. The Senate's floor discussion focused on the need for three specific types of employees—salesmen, partsmen, and mechanics—to work long and unpredictable hours (and for some to travel off-site). Senators emphasized that salesmen sold automobiles outside business hours, mechanics traveled for rural service calls, and farm-implement partsmen (the partsmen who were the focus of the congressional debate) had to respond to emergency calls for parts around the clock. 112 CONG. REC. 20,502–04 (Aug. 24, 1966) (Sens. Bayh, Hruska, Mansfield, and Yarborough).

The 1966 statute thus exempted only those three types of dealership employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836, *reprinted in* App., *infra*, at A1. The statute expressly authorized DoL to promulgate implementing regulations. *Id.* § 602, 80 Stat. at 844, *reprinted in* App., *infra*, at A2.

4. *DoL's 1970 Ruling That Service Advisors Are Not Exempt.* In 1970, DoL issued an interpretive rule clarifying that service advisors do not fall within the salesman/partsman/mechanic exemption. 35 Fed.

Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). Because it treated the 1970 rule as interpretive, DoL did not employ notice-and-comment rulemaking procedures. *Id.* at 5856. The rule explained that service advisors' main tasks of diagnosing automobiles' repair needs, writing up work orders, and assigning mechanics work did not make them exempt. *Id.* at 5896. Thus, service advisors are not exempt as salesmen, because "a salesman" must be "employed for the purpose of and *primarily engaged in making sales* or obtaining orders or contracts for sale *of the vehicles or farm implements*" sold by the dealership. *Id.* (codified at 29 C.F.R. § 779.372(c)(1) (1971)) (emphases added).

This rule remained in place until DoL repromulgated it as a notice-and-comment regulation in 2011.

5. *The 1974 Re-Enactment of the Exemption.* In 1974, Congress re-enacted the dealership exemption, without any changes affecting automobile dealerships. The amendment added a separate exemption for boat salesmen and removed exemptions for trailer partsmen and mechanics as well as aircraft partsmen and mechanics. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65. As codified, the statute is reprinted in Pet. App. 39 and Pet. Br. App. 6a–7a. Like the 1966 Act, the 1974 statute expressly authorized DoL to promulgate implementing regulations. *Id.* § 29(b), 88 Stat. at 76, *reprinted in* App., *infra*, at A2.

6. *A Period of Non-Enforcement.* In 1973, long before *Chevron*, the Fifth Circuit refused to defer to DoL's interpretive rule. Even though it found the statute "not entirely clear," it held that service

advisors were exempt from overtime because they were "functionally similar" to partsmen and mechanics. *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1097–98 (5th Cir. 1973). In response to this and three district court decisions, DoL issued an opinion letter and added an insert to its operations handbook noting that it would treat service advisors as exempt. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., INSERT NO. 1757, FIELD OPERATIONS HANDBOOK 24L04–4(k) (1987), https://perma.cc/5ghd-kcjj, at 35.

Neither of these enforcement documents offered any reasoning apart from mentioning the lower court decisions. The Field Operations Handbook noted that officially changing the agency's position to exempt service advisors would require revising the 1970 rule, *id.*, but DoL took no formal action to change its position.

7. *DoL's 2008 Notice of Proposed Rulemaking.* In 2008, DoL issued a notice of proposed rulemaking to eliminate inconsistency between its 1970 rule and its informal enforcement materials. It stated that it was considering revising 29 C.F.R. § 779.372(c)(1) and (c)(4) to exempt service advisors. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008), *reprinted in* App., *infra*, at B1–B3.

Five of the seven relevant comments opposed the proposed change because it would contravene the FLSA's text, legislative history, and congressional intent. *See, e.g.*, George Miller (Chairman, House Committee on Education & Labor) et al., Comment Letter on Proposed Rule to Update Regulations

Issued Under the FLSA (Sept. 26–27, 2008), at 7–8, http://tinyurl.com/gu4f7ne.

8. *DoL's 2011 Notice-and-Comment Regulation.* In 2011, after reviewing and analyzing the comments it received, DoL declined to broaden the statutory exemption to include service advisors. It explained that only "salesmen who sell vehicles and partsmen and mechanics who service vehicles" should be exempt, not service advisors, who "merely coordinate between customers and the mechanics who actually perform the services." 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011), *reprinted in* App., *infra*, at C1–C6.

Thus, after notice and comment, DoL "concluded that current [29 C.F.R. §] 779.372(c) sets forth the appropriate approach to determining whether [service advisors] are subject to the exemption." *Id.* It rejected the proposed § 779.372(c)(4), which would have reversed DoL's official position. In essence, the agency repromulgated its original interpretation as a notice-and-comment regulation. The final regulation is reprinted in Pet. Br. App. 27a–28a and Pet. App. 60–61.

B. Facts and Procedural History

1. *Facts.* Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz automobile dealership in the Los Angeles area. J.A. 38–40. Their job was to "meet and greet" customers, "accept cars for service," suggest that "certain services be conducted" based on "complaints given [to] them by the[] vehicle owners," and suggest "supplemental service." J.A. 39–40. After communicating with customers, they "wr[o]te up an estimate for the repairs and services." J.A. 40. Porters then took automobiles

back "to the mechanics . . . for repair and maintenance." *Id.*

During the dealership's regular business hours, the service advisors "[we]re required to remain at their service posts" in the dealership's service department. J.A. 39. The dealership required them to work from 7 a.m. to 6 p.m. at least five days per week, totaling a weekly minimum of fifty-five hours. J.A. 39. The employees were paid on commission and received no overtime for hours in excess of forty per week. J.A. 40–41.

2. *The District Court's Dismissal.* In 2012, respondents filed suit in federal district court, alleging various violations of the FLSA and state law. Count One, at issue here, alleged that petitioner violated the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. J.A. 42–44. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A).

The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 27. But, viewing DoL's 2011 notice-and-comment regulation as "mere[ly] interpret[ive]" rather than legislative, the court "accorded [it] lower deference." Pet. App. 29. Embracing *Deel Motors*'s reasoning that service advisors are "functionally equivalent to salesmen and mechanics," the district court rejected DoL's regulation as "unreasonable." Pet. App. 29 (citing 475 F.2d at 1097–98). After dismissing respondents' other FLSA claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. Pet. App. 29–31.

3. *The Court of Appeals' Reversal.* The court of appeals reversed the dismissal of the FLSA overtime claim. The court observed that "[petitioner] concede[d] that [respondents] do not meet the regulatory definitions" of salesmen, partsmen, or mechanics. Pet. App. 5. Because DoL had reaffirmed its position in 2011 after notice-and-comment rulemaking, the court of appeals evaluated the regulation under *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 10–11.

At *Chevron* step one, the court rejected petitioner's argument that the statute unambiguously exempts service advisors as salesmen who supposedly service automobiles. Pet. App. 6–8. The court adverted briefly to this Court's canon of construing FLSA exemptions narrowly. Pet. App. 6 & n.3, 8, 11.

At *Chevron* step two, the court found DoL's interpretation of the statute reasonable and therefore entitled to deference. The noun "salesman," it noted, relates directly to the gerund "selling," but not to "servicing." Pet. App. 13–15. The court declined to follow lower court decisions predating the 2011 notice-and-comment regulation, which had no reason to address, and had not addressed, the reasonableness of the 2011 regulation under *Chevron*. Pet. App. 11–12.

The court of appeals thus unanimously reversed the dismissal of the FLSA overtime claim and supplemental state-law claims and remanded for further proceedings. Pet. App. 19. Petitioner filed a petition for rehearing en banc, but no judge requested a vote on it. Pet. App. 20.

SUMMARY OF ARGUMENT

The salesman/partsman/mechanic exemption exempts salesmen who sell automobiles and partsmen and mechanics who service automobiles, not service advisors who may sometimes sell services. DoL's notice-and-comment regulation reflects the statute's clear meaning at *Chevron* step one; at the very least, it is a permissible reading at *Chevron* step two.

I.A. By its terms, § 213(b)(10)(A) does not exempt service advisors, because they neither sell automobiles nor service them. The exemption enumerates only three items that exempt salesmen sell: "automobiles, trucks, or farm implements." Salesmen who sell *services* are not exempt. Congress's discussion of salesmen concerned only automobile, truck, or farm-implement salesmen. Petitioner concedes that service advisors do not sell any of these.

Since the statute omits "services" as an object of "selling," petitioner seeks to shoehorn "selling services" into "servicing automobiles." But dictionaries and other U.S. Code provisions define "servicing" and "to service" to mean automotive maintenance, repair, and similar manual labor, not "selling" or clerical tasks such as writing up work orders and estimates. Petitioner seeks to expand "servicing automobiles" into "the process of servicing." But Congress did not use the word "process," and adding that elastic word would go a long way toward re-enacting the 1961 blanket exemption that Congress repealed.

B. The exemption's sentence structure confirms that service advisors fall outside it. As the words' shared etymology indicates, a *sales*man's job is *sell*ing things, not servicing them. Computer searches

of millions of books return hardly any references to salesmen servicing automobiles or similar machines.

The distributive canon *reddendo singula singulis* buttresses the inference that "salesman" goes with "selling," while "partsman" and "mechanic" go with "servicing." More than a hundred federal statutes use this type of distributive (as opposed to collective) phrasing. Often, as here, the first noun pairs with the first verb and the last noun(s) with the last verb(s). Statutes reflect that pattern regardless of whether, as here, there are more nouns than verbs.

Petitioner's only response is to posit a "default grammatical rule" that calls for reading statutes collectively, relating all nouns to all verbs. Pet. Br. 32. But Chief Justice Marshall, Scalia & Garner, Fowler's, and Strunk & White are all to the contrary. And petitioner must concede this statute is phrased at least in part distributively. Otherwise, applying petitioner's own rule consistently would create a nonexistent class of "mechanics primarily engaged in selling . . . automobiles." But a mechanic who primarily sells automobiles is a salesman, not a mechanic. So too, by definition, a salesman cannot primarily service automobiles, or else he would be a mechanic or partsman, not a salesman.

Petitioner's argument hangs largely on its repeated use of ellipses, to define a type of "salesm[e]n . . . primarily engaged in . . . servicing automobiles." If the statute read that way, with no omitted words, a court might have to struggle to find some type of employees who would fit. But, as the exemption actually reads, "salesman" comfortably fits the omitted

gerund "selling," just as the omitted nouns "partsman, or mechanic" fit "servicing."

C. Congress's 1974 amendments to § 213(b)(10) confirm the statute's distributive meaning. The House floor manager's summary of the final bill explained that salesmen had to be "primarily engaged in selling automobiles." Congress also added a new subsection (B) that paired "salesman" only with "selling," confirming that the two go together.

D. The statute's express exemption of "partsm[e]n" does not open the door to service advisors as well. Congress added partsmen to the exemption primarily because farm-implement partsmen play crucial roles helping mechanics during harvest season. Partsmen, unlike service advisors, have often worked as a mechanic's right-hand man or woman by grinding down parts, measuring parts with specialized tools, identifying precise parts needed for particular jobs, and handing parts over a counter to mechanics. They work in the back, by the mechanics' shop, and wear uniforms suitable for getting their hands dirty.

E. Congress listed three and only three types of dealership employees because they often had to work irregular hours, often off-site, making it hard to track hours and standardize pay. Service advisors, by contrast, work fixed shifts on-site.

F. If there were any lingering doubt, this Court's canon of construing FLSA exemptions narrowly precludes petitioner's expansive interpretation. That canon was a well-settled background rule when Congress passed the 1966 and 1974 amendments, as referred to by the House floor manager.

II.A. Even if there were any ambiguity, DoL's 2011 notice-and-comment regulation is a reasonable interpretation of the statute. Since the 1966 and 1974 FLSA Amendments expressly authorized DoL to issue implementing regulations, and DoL followed notice-and-comment procedures, *Chevron*'s framework governs.

B. In explaining its new regulation, DoL reasonably addressed comments raising the same arguments that petitioner now raises, including the industry's claims of reliance on two enforcement documents.

C. DoL's period of nonenforcement, in the face of several lower-court cases, did not change its longstanding 1970 regulation. Even if it had, agencies are free to change course. There is nothing "retroactive" about applying a 2011 notice-and-comment regulation to post-2011 conduct.

D. Dealerships cannot avoid paying service advisors overtime simply by paying them on commission. The exemption says nothing about commission-based pay, and mechanics and partsmen often are not paid commissions. Indeed, Congress provided a different exemption for commissioned sales employees, with certain safeguards. Petitioner's argument by analogy would undermine those safeguards.

ARGUMENT

DoL promulgated the FLSA notice-and-comment regulation at issue here pursuant to express statutory delegations of authority. Thus, *Chevron* governs the validity of the regulatory interpretation of § 213(b)(10)(A). Under that framework, unless "[1] Congress has directly spoken to the precise

question at issue. . . . [2] the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842–43.

Here, at *Chevron* step one, Congress has unambiguously excluded service advisors from the salesman/partsman/mechanic exemption. Even if there were any ambiguity at step one, DoL's notice-and-comment regulation would be a reasonable interpretation of the statute at *Chevron* step two.

I. AT *CHEVRON* STEP ONE, THE FLSA'S OVERTIME EXEMPTION FOR AUTOMOBILE DEALERSHIP SALESMEN, PARTSMEN, AND MECHANICS DOES NOT EXEMPT SERVICE ADVISORS

When Congress repealed the 1961 overtime exemption for all dealership employees, it limited the exemption to only three enumerated types of dealership employees ("salesman, partsman, or mechanic") primarily engaged in two particular activities ("selling or servicing") on three types of machinery ("automobiles, trucks, or farm implements"). 29 U.S.C. § 213(b)(10)(A). As DoL recognized in promulgating its 2011 notice-and-comment regulation, this language naturally covers "salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838, *reprinted in* App., *infra*, at C6.

Service advisors fall outside the exemption because they neither sell vehicles nor service vehicles. Even assuming *arguendo* that service advisors are "salesm[e]n" and are "primarily engaged in selling" instead of administrative or clerical tasks, they do not sell "automobiles, trucks, or farm implements." The exemption does not cover selling services, as

services are not "automobiles." "[T]he exemption requires an employee to either primarily service the vehicle or sell the vehicle—not sell the service of the vehicle . . . ." *Id.*, *reprinted in* App., *infra*, at C4 (internal quotation marks omitted).

Nor are service advisors "primarily engaged in . . . servicing automobiles," as "servicing" means automotive manual labor such as maintenance and repairs. The first noun, "salesman," naturally pairs with the first gerund "selling," just as the last two nouns "partsman, or mechanic" naturally pair with the last gerund "servicing." By eliding crucial words, petitioner contrives a category of "salesmen primarily engaged in servicing automobiles." *E.g.*, Br. 1, 20, 24, 25, 31, 33. But that reading contravenes dictionary definitions, English grammar and usage, the statutory structure, other statutes' patterns, congressional intent, and canons of construction.

A. Service Advisors Are Not "Primarily Engaged in Selling or Servicing Automobiles, Trucks, or Farm Implements"

The exemption at issue applies only to salesmen, partsmen, or mechanics who are "primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). "Primarily engaged" means that "the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles." 29 C.F.R. § 779.372(d). Petitioner does not claim that service advisors are partsmen or mechanics or that they spend any, let alone the majority, of their time selling automobiles. Nor, as shown by ordinary English usage and Congress's own usage in other statutes,

are service advisors engaged in "servicing" automobiles. They therefore fall outside the exemption.

1.a. *The Statute Applies to Salesmen Who Sell Automobiles, Not Services or Other Items.* As written, the exemption at issue here enumerates three and only three direct objects of "selling" and "servicing": "automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). Service advisors do not sell any of them.

Many dealership employees fall outside the exemption even though they sell automobile-related goods or services. Petitioner concedes that "salesmen who sell warranties, underbody coatings, or insurance" are not exempt. Cert. Reply Br. 7 n.2. Petitioner's amicus admits that employees who sell leases "**are not** *salesmen* under [§ 213(b)(10)(A)], since they are not selling vehicles to ultimate purchasers." NAT'L AUTO. DEALERS ASS'N, A DEALER GUIDE TO THE FAIR LABOR STANDARDS AND EQUAL PAY ACTS 12 (2005) (emphases in original).

Courts agree that other dealership sales staff are not exempt, because they do not sell automobiles. *E.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–5 (10th Cir. Apr. 25, 2003) (unpublished) (declining to exempt finance managers and finance contractors as salesmen because they sell extended warranties, not automobiles); *Gieg* v. *Howarth*, 244 F.3d 775, 776–77 (9th Cir. 2001) (same, for finance writers, because they sell financing, insurance, and warranties, not automobiles).

Thus, petitioner's charge that DoL's regulation "divide[s] a dealership's salesforce in half" is refuted

by petitioner's own concession. Br. 2; *accord id.* at 3, 36, 44–45. It is the statute itself that limits "salesm[e]n" to employees who sell "automobiles," not those who may sell automobile-related goods or services.

b. Congress understood that it was exempting only automobile salesmen, not dealership employees who sold services or goods. Throughout the legislative history of the 1966 FLSA Amendments, Senators and Representatives consistently used "salesman" to refer only to vehicle or farm-implement salesmen, never service advisors or employees who sold other things. For example, as the Senate floor manager explained, "the salesman . . . can go out and sell an Oldsmobile, a Pontiac, or a Buick." 112 CONG. REC. 20,504 (Aug. 24, 1966) (Sen. Yarborough); *accord id.* ("The salesman tries to get people mainly after their hours of work" when "they go to look at automobiles."). Petitioner does not cite, and we cannot find, a single reference by any member of Congress to salesmen at automobile dealerships selling anything other than automobiles, let alone services. No speaker felt the need to clarify that "salesman" meant "automobile salesman"—it was obvious, and Congress had no other type in mind.

2.a. *"Servicing" Means Automotive Manual Labor.* To get around Congress's omitting "services" as a direct object of "selling," petitioner seeks to shoehorn "selling services" into the other gerund, "servicing." But service advisors are not engaged, let alone "primarily engaged," in "servicing automobiles." They do not work with their hands, but write up repair estimates and work orders before the servicing begins.

"Servicing" here means automotive manual labor, quintessentially maintenance or repairs. Contemporaneous dictionaries list performing mechanical work as the first definition of the transitive verb "service," and illustrate it with the example of repairing or maintaining an automobile. 4 WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2288 (2d ed. 1956) [hereinafter WEBSTER'S SECOND]; THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1304 (1st ed. 1966); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1185 (1st ed. 1969). In the *American Heritage* (at XLVII) and *Random House* (at xxix) dictionaries, listing a definition first conveys "the word's primary meaning." *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). And the *Oxford English Dictionary*'s first definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle." 15 OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989).

Congress has repeatedly used the term "servicing" in the United States Code to mean automotive manual labor, such as maintenance and repairs. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery, and checking and adding oil." 2 U.S.C. § 2025(b). Another statute limits ozone-depleting emissions by regulating who may "repair[] or servic[e]" vehicles' air conditioners: "[N]o person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner . . . unless such person has been properly trained and certified." 42 U.S.C. § 7671h(c). If petitioner were correct that

service advisors were engaged in servicing automobiles, they would be forbidden to schedule such air-conditioning work unless they had been "properly trained and certified."

In this case, Congress used the term "servicing" in its ordinary sense, to refer to the activity of employees who maintain or repair automobiles. Because service advisors do neither, they fall outside the statutory exemption.

b. Petitioner erroneously asserts that "DoL would add one word to the statute": the word "personally." Br. at i, 28–29. But *DoL never used the word* "personally" in the 1970 or 2011 regulation, preamble, or notice of proposed rulemaking. App., *infra*, at B1–C6; Pet. Br. 25a–28a. The decision below used the word only in passing, in two sentences, to explain that the regulation reasonably reads "servicing" to require automotive manual labor. Pet. App. 13. The court acknowledged that "servicing" an automobile means performing maintenance or repairs on it, not writing up paperwork for someone else to maintain or repair it.

Rather, it is petitioner who seeks to expand the meaning of "servicing" by adding new words to the statute. Petitioner argues that service advisors are part of "the service process," Br. 25, "the process of servicing," Br. 23, 30, or "integral to the servicing process," Br. 1, 30. But the statute uses the word "servicing" to describe the particular activity of exempt employees, without adding any form of the word "process."

There is a fundamental difference between the statute as written and petitioner's rewrite. For

instance, judges are assisted by law clerks and bailiffs. As employees of the judicial branch or department, they take part in the *process* of judging or adjudicating cases. Yet no one would say that law clerks or bailiffs are engaged in judging.

Congress exempted only three specific types of employees, not entire "categories" or departments such as "the dealership's salesforce and service teams." *Contra* Pet. Br. 36, 39; *see id.* at 2, 3. Inventing an exemption for "all core sales and service employees" (*id.* at 44–45) or those "integral to the servicing process" (*id.* at 1, 30), whatever that means, would dramatically expand the exemption and ensnare courts in endless line drawing. That is a task for Congress or the agency, not the courts.

B. The Structure of the Exemption Confirms That Service Advisors Fall Outside It

The exemption applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. § 213(b)(10)(A). According to both standard English usage and canons of statutory construction, the first subject "salesman" goes with the first gerund "selling," just as the latter subjects "partsman" and "mechanic" go with the latter gerund "servicing."

1. *Salesmen Sell, Not Service.* The statutory term "salesman" naturally fits with the first gerund "selling," not "servicing." In ordinary English, a salesman is one whose job is selling. The nouns "salesman" and "sale" and the transitive verb "sell" share the same etymological root, **saljan*. 14 OXFORD ENGLISH DICTIONARY 391, 388, 394 (2d ed.

1989); WEBSTER'S SECOND 2204, 2203, 2272. By contrast, "salesman" has no etymological connection to "service" or "servicing." This Court has relied on the etymological linkage between nouns and verbs, holding that Congress's use of the verb "carry" signaled its intent to reach the etymologically related nouns "car" and "cart." *Muscarello*, 524 U.S. at 128.

Empirical data on English usage confirm that "salesman" does not fit with "servicing" automobiles. In the entire Google Books database of more than 24 million books, the phrase "salesman servicing" appears only about 150 times, almost always in the context of salesmen servicing sales accounts or territories. https://books.google.com. *Only one example* relates to servicing automobiles or similar machines: a book reporting a case that denied worker's compensation to a gas-station attendant who was injured when fixing an automobile on the side for his own profit, because servicing automobiles was *not* part of his job selling gasoline. That is the exception that proves the rule. *Dunn* v. *Univ. of Rochester*, 194 N.E. 856, 856–57 (N.Y. 1935) (per curiam), *summarized in* N.Y. STATE, WORKMEN'S COMPENSATION LAW AND INDUSTRIAL BOARD RULES 17 (1936).

This remarkable absence of usage refutes petitioner's strained interpretation. Any ordinary English speaker understands that "salesm[e]n" engage in "selling," not "servicing automobiles," just as "mechanic[s]" engage in "servicing," not "selling."

2. Reddendo Singula Singulis: *The First Subject Goes with the First Verb, Just as the Last Subject Goes with the Last Verb*. Reading each subject noun in the statute with its respective gerund is also

required by a venerable linguistic canon. *Reddendo* (or *referendo*) *singula singulis*, also known as the "distributive canon," provides for "[a]ssigning or distributing separate things to separate persons, or separate words to separate subjects." BLACK'S LAW DICTIONARY 1467 (10th ed. 2014); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 214 (2012); 1 EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES: A GENERAL DISCUSSION OF CERTAIN FOUNDATIONAL SUBJECTS § 194, at 333 (1940); HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 74, at 226–27 (2d ed. 1911) .

a. The *reddendo* canon dates back as far as the Marshall Court. After Maryland and Virginia ceded land to form the District of Columbia, Congress passed a statute retaining the body of law that had existed in each formerly separate part of the District. *United States* v. *Simms*, 5 U.S. (1 Cranch) 252, 253–54, 256 (1803). Maryland and Virginia had different procedures for gambling fines and forfeitures: Maryland authorized proceeding by *indictment*. *Baker* v. *State*, 2 H. & J. 5, 5, 1806 WL 247 (Md. 1806). By contrast, Virginia authorized "any person" to bring an action of *debt* for the statutory penalty. *Simms*, 5 U.S. at 252–53; *see id.* at 254. The U.S. government "admitted that, under the laws of Virginia, an indictment for this penalty could not be sustained." *Id.* at 256; *see also Commonwealth* v. *Richards*, 1 Va. Cas. 133, 136, 1803 WL 322 (Gen. Ct. Va. 1803) (holding that Virginia could not recover a statutory gambling forfeiture by information).

Despite this history, the U.S. government brought a forfeiture action by indictment (the Maryland procedure) in Alexandria County (ceded by Virginia). The government argued that a federal statute had established a "new remedy" allowing the government to proceed by indictment. 5 U.S. at 256. The federal statute provided that "all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this [D]istrict [of Columbia], shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer." *Id.* at 254.

Writing for the Court, Chief Justice Marshall rejected the government's argument that because the statute was phrased disjunctively, it authorized proceeding by indictment. 5 U.S. at 258–59. Instead, applying the *reddendo* canon, the Court interpreted the statute to authorize proceeding by indictment only when state law would have authorized that state to proceed by indictment. *Id.* Because Virginia law allowed qui tam relators to bring actions of debt, it was "more proper to suppose the *qui tam* action, given in this case, to be the remedy, than an indictment." *Id.* at 259. The Court rejected the argument that one state's laws could be enforced via any of the three modes of proceeding: "It can not be presumed that [C]ongress could have intended to use the words in the unlimited sense contended for." *Id.* at 258.

b. A more recent example is also instructive. The late Justice Scalia and Garner offer the illustration of a school charter that provides: "[m]en and women are eligible to join fraternities and sororities."

SCALIA & GARNER 314. The sentence "cannot reasonably be read to suggest an unconventional commingling of sexes in club membership." *Id.* Applying ***reddendo singula singulis***, the first subject "men" goes with the first object "fraternities," just as the last subject "women" goes with the last object "sororities." Men cannot complain that they have been denied their right to join sororities. *See id.* The same would hold true if the charter included the word "any" and the disjunctive "or": providing that any man or woman is eligible to join a fraternity or sorority would mean the same thing. *See* BLACK § 74, at 226–27 (the statutory phrase "for money or other good consideration paid or given" means "money paid or other good consideration given").

c. Congress regularly follows this pattern in drafting statutes. Linguists call it "distributive" (as opposed to "collective") phrasing: certain nouns (or other words) in a list pair with certain verbs (or other words) in a second list. Etymological or semantic links among the corresponding words, like those between "salesman" and "selling," often make the distributive reading even clearer.

For instance, an agricultural statute allows certain measures to be repealed by vote of a majority of kiwifruit producers and importers if "the *producers* and importers *produce* and import more than 50 percent of the total volume of kiwifruit *produced* and imported by persons voting in the referendum." 7 U.S.C. § 7470(d) (emphases added to show the linked terms); *accord id.* § 4611(b)(1)(B). More than a hundred federal statutory provisions follow this general distributive pattern. App., *infra*, at D1–D41.

The decision below relied on a similar example: "if my dogs or cats are barking or meowing, then I know that they need to be let out." Pet. App. 14. Every reader understands that the first subject "dogs" goes only with the first gerund "barking," just as the last subject "cats" goes only with the last gerund "meowing." *Id.*

d. The order of words in the statute, as in the examples just given, reinforces the *reddendo singula singulis* inference. First often goes with first, as last often goes with last. In the dealership exemption, "salesman," the first noun, pairs with "selling," the first gerund. "Partsman" and "mechanic," the last two nouns, pair with "servicing," the last gerund. The kiwifruit example above follows this pattern. So does a statute regulating toxins and germ warfare: "In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall—(i) consider . . . (III) the availability and effectiveness of *pharmacotherapies* and prophylaxis to *treat* and prevent any illness caused by the agent or toxin . . . ." 7 U.S.C. § 8401(a)(1)(B) (emphases added to show the linked terms). As the dozens of statutes appended to this brief show, Congress often follows this particular distributive pattern, pairing the first noun in a statute with the first verb and the last noun with the last verb. App., *infra*, at D21–D35.

e. Petitioner resists this reasoning because the exemption lists three subjects (salesmen, partsmen, and mechanics) but only two gerunds (selling and servicing), so the subjects and verbs do not correspond one-to-one. Br. 33. But the distributive inference still holds, because certain subjects naturally

relate to certain verbs: "salesman" to "selling," "partsman" and "mechanic" to "servicing." If a zookeeper said, "When my cats, dogs, or seals are meowing or barking, I feed them," a listener would still understand that only cats meow, while only dogs and seals bark. One is not forced to imagine a cat with a terrible, barking cough. Thus, in *Simms*, Chief Justice Marshall's opinion applied *reddendo* even though the statute listed only two states (Maryland and Virginia) but three modes of proceeding (indictment, information, or action of debt).

Similarly, there are more than fifty distributively phrased federal statutes in which the number of nouns differs from the number of verbs. App., *infra*, at D1–D20. For instance, the Secretary of the Interior may "make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost*, *destroyed*, or damaged by the earthquake of March 27, 1964." 16 U.S.C. § 742c(e) (emphases added to linked terms).

Likewise, the statute prescribing licensing requirements for commercial drivers defines a "motor vehicle" as "a *vehicle*, *machine*, *tractor*, trailer, or semitrailer *propelled* or drawn by mechanical power . . . ." 49 U.S.C. § 31301(12) (same). The first three nouns relate only to the first participle, "propelled," and the last two nouns relate only to the latter participle, "drawn." While one could imagine a vehicle that is drawn, such as an automobile or motorcycle being towed or on a vehicle transport trailer, it would not be covered by the statute. The commercial driver needs a driver's license only for the tow truck

or tractor-trailer, not a separate license for the automobile or motorcycle being drawn.

3. *Petitioner's Reasons for Rejecting This Distributive Reading Are Wrong.* Petitioner resists this ordinary English distributive usage. Instead, it hypothesizes a contrary grammatical rule that presumes every verb in a sentence relates to every noun, "unless [a] disjunctive gerund is distinct to one of the disjunctive nouns." Br. 32. Notably, petitioner cites no authority for this supposed grammatical rule, and we can find none.

a. *"Respectively" Is Usually Superfluous.* Petitioner's purported rule would require writers to add "respective" or "respectively" to the end of a list of subjects, verbs, or objects, to negate petitioner's inference. But the leading authorities on English grammar hold that "respective" and "respectively" are usually superfluous. Strunk & White stated: "These words may usually be omitted with advantage." WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 51 (2d ed. 1972). Likewise, Fowler's second edition noted: "Delight in these words is a widespread but depraved taste. . . . [O]f ten sentences in which they occur, nine would be improved by their removal." H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 521 (2d ed. 1965). The wording of the exemption is consistent with Strunk & White's and Fowler's guidance.

b. *Petitioner's Reasoning Would Suggest a Non-Existent Category of Mechanics Who Primarily Engage in Selling.* Petitioner's supposed grammatical rule would also yield a very strange, nonexistent category of "mechanic[s] primarily engaged in selling

. . . automobiles." But anyone who is "primarily engaged in selling . . . automobiles" is not a mechanic at all; he is an automobile salesman. Similarly, a "salesman" who is "primarily engaged in" turning a wrench is not a salesman at all, but a mechanic.

Petitioner must thus concede that the statute is distributive at least with respect to mechanics. Petitioner can respond only that in such cases, as with the statutes appended to this brief, "the default [grammatical] rule can be overcome when the gerunds are by their nature limited to a particular noun." Br. 33 (citing no authority). Petitioner thus makes its *ipse dixit* unfalsifiable, waving off Fowler's, Strunk & White, and more than a hundred statutory counterexamples appended to this brief.

c. *Petitioner's Ellipses Obscure the Issue.* Much of petitioner's argument relies on its use of ellipses. Petitioner repeatedly omits the other subjects, gerunds, and objects, quoting the statute as exempting some variant of "any salesman . . . primarily engaged in . . . servicing automobiles . . . ." *E.g.*, Br. at i, 1, 20, 24, 25, 31, 33. If the entire provision exempted *only* "any salesman primarily engaged in servicing automobiles," with no other subjects, gerunds, or direct objects, one might strain to find some nonzero set of salesmen who service. But that is not what Congress wrote, and the exemption covers its intended type of salesmen—automobile salesmen—without recourse to such artifice.

d. *The Adjective "Any" Neither Expands the Plain Meaning of "Salesman" Nor Affects Its Direct Object "Automobiles."* Seeking to expand the statutory term "salesman," petitioner seizes on its modifier "any."

Br. 26. But the adjective "any" cannot expand the meaning of "salesman," the subject it modifies, let alone the direct object "automobiles," which it does not modify. The word "any" "do[es] not broaden the ordinary meaning of the" nouns it modifies. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 93 (2006). Even when "any" is used as a "catchall . . . [it does] not . . . define what it catches." *Flora* v. *United States*, 362 U.S. 145, 149 (1960). A restrained reading of "any" is especially appropriate where, as here, an overbroad reading would lead to "strange and indeterminate results." *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 133 (2004).

e. *The Disjunctive "Or" Does Not Change the Analysis.* Petitioner repeatedly asserts that the disjunctive word "or" "plainly broadens the exemption." Br. 18; *accord id.* at 2, 17, 24. But neither of the authorities cited says anything about how multiple nouns relate to multiple verbs. They state only that separate terms in a list should "be given separate meanings" so that none becomes surplusage. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *see also FCC* v. *Pacifica Found.*, 438 U.S. 726, 739–40 (1978). DoL's regulation does not create surplusage; it gives effect to every word in the statute. It is only petitioner's ellipses that stitch together unrelated words into the unnatural combination of "salesmen . . . primarily engaged in . . . servicing automobiles."

f. *The Distributive Reading Makes Sense.* Petitioner's arguments rest on conflating words that sound alike but are different parts of speech: verbs such as "servicing" and nouns such as "services." Thus, petitioner asserts, without supporting authority,

that "[i]t would be nonsensical to suggest that an individual who is primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles." Br. 19, 25 (emphases in original). But it is not "nonsensical to suggest that [a taxi dispatcher] who is primarily engaged in selling the [driving of taxis] is engaged in *neither* selling [taxis] *nor* [driving taxis]." Nor is it "nonsensical to suggest that [a maid-service marketer] who is primarily engaged in selling the [cleaning of houses] is engaged in *neither* selling [houses] *nor* [cleaning houses]."

Petitioner elides the difference between selling a service and performing the service oneself. A middleman or woman often sells the right to a service without performing the service himself or herself. That is true of insurance agents, travel agents, mortgage brokers, and the like. (Indeed, that is the premise of the sharing economy. Airbnb, for instance, sells overnight stays in private homes without itself accommodating travelers. https://www.airbnb.com.) Service advisors are no different.

Petitioner's example reflects its confusion of nouns and verbs. In petitioner's example, "the servicing of automobiles" is an awkward way of phrasing the direct object "automobile services." In that example, the person selling the services need not do the servicing. But in the actual statutory exemption, "servicing" functions as an active verb. That means that the subject of the active verb, the "salesman," must perform the "servicing" upon the direct object "automobiles." Even if a salesman sells automobile services performed by a mechanic, the salesman is not the one who is "servicing" the automobiles.

C. Congress Understood This Distributive Reading When It Adopted the 1974 FLSA Amendments

The 1974 FLSA Amendments reflect Congress's understanding that salesmen primarily engage in selling, not servicing. On the day of the final floor vote on the 1974 bill, the House floor manager, Representative Dent, distributed a summary section-by-section analysis of the final bill. It read in part: "*Salesmen, Partsmen, and Mechanics*.—Provides an overtime exemption for *any salesman primarily engaged in selling automobiles*, trailers, trucks, farm implements, boats, or aircraft if employed by a [dealership]. Also provides an overtime exemption for partsmen and mechanics of automobile, truck, and farm implement dealerships." 120 CONG. REC. 8602 (Mar. 28, 1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1974, at 2391 (1976) [hereinafter 1974 LEGISLATIVE HISTORY] (second emphasis added). No one thought they were exempting salesmen who engaged in anything other than selling vehicles or farm implements.

The structure of the 1974 amendment underscores this understanding. The original 1966 exemption, § 213(b)(10), had no subsections, but the 1974 amendments split the provision into two subsections. Subsection (A) retained the existing exemption for salesmen, partsmen, and mechanics at automobile, truck, and farm-implement dealerships. Congress removed trailer and aircraft dealerships (and added boat dealerships) to a new subsection (B), limiting it to "any salesman primarily engaged in selling." The gerund "servicing" was omitted along with the subjects "partsman, or mechanic." *Compare* App., *infra*,

at A1 (1966 version), *with* Pet. Br. App. 6a–7a (1974 version).

These amendments made two changes. First, the new subsection (B) paired boat salesmen only with "selling," because Congress understood that salesmen sell. The second change is a negative inference, but even more telling. The Senate floor manager's section-by-section analysis, offered shortly before the Senate passed the bill, explained the 1974 revision as "repealing the overtime exemption for partsmen and mechanics in . . . trailer[] . . . [and] aircraft [dealerships]." 120 CONG. REC. 8763 (Mar. 28, 1974), *reprinted in* 1974 LEGISLATIVE HISTORY 2411; *accord* H.R. REP. NO. 93–313, at 47 (1974), *reprinted in id.* at 2156; S. REP. NO. 93–690, at 44 (1974), *reprinted in id.* at 1548; *see also* 76 Fed. Reg. at 18,837 (DoL's explanation of history leading up to 2011 regulation).

When Congress eliminated partsmen and mechanics for subsection (B), the gerund "servicing" went with them. One verb remained with "salesman": "selling." If, as petitioner argues, Congress had meant to cover a type of "salesm[e]n . . . primarily engaged in . . . servicing," it would have acknowledged that the amendment had *also* repealed the supposed exemption for "salesm[e]n . . . primarily engaged in . . . servicing" trailers and aircraft. But no one thought such an employee existed—the repeal affected only partsmen and mechanics. Congress's understanding of its amendment reflected common parlance: salesmen sell, and partsmen and mechanics service.

D. Congress, by Expressly Including "Partsman," Did Not Implicitly Add "Service Advisor" to the Statute

Petitioner concedes that service advisors do not go "under the hood performing the service." Br. 30. Nevertheless, it argues that when Congress expressly added "partsman" to the list of exempt employees, it implicitly expanded the meaning of "servicing" beyond employees who do "the hands-on servicing of automobiles" to all employees who are "integral to the servicing process." Br. 19, 30. It claims that "[p]artsmen are no more (or less) directly involved in the hands-on servicing of automobiles than service advisors." Br. 19. Unless one reads "servicing" expansively, it asserts, "partsmen" would be "nearly a null set." Br. 30.

Petitioner's unsupported assertions are mistaken. Partsmen, unlike service advisors, work with their hands, work in the back with mechanics, and so wear uniforms suitable for dirty work.

1. *Some Partsmen Perform Automotive Manual Labor.* From 1966 through today, automobile dealership partsmen have had two distinct roles. Some sell parts directly to consumers, while others work with and supply parts to the dealership's mechanics. *See Automobile Parts Countermen, in* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, BULL. NO. 1450, at 312, 312 (1966–67 ed.) [hereinafter 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK].

Both automobile and farm-implement dealerships often have a separate parts counter on the shop floor staffed by a few dedicated partsmen. CAL. STATE

DEP'T OF EDUC., AUTO PARTS MAN 8–9 (1967); *see also* Charlie Cape, *They're Organized for Efficiency at Sell & Son*, IMPLEMENT & TRACTOR, Feb. 7, 1973, at 9–10. As one contemporary partsman training manual observed, "th[e] interdependence of departments becomes most evident at the [partsman's] shop counter, where mechanics and parts men meet. Nowhere in the automotive agency is cooperation needed more than here." AUTO PARTS MAN 49.

Partsmen need extensive mechanical expertise to assist mechanics. From an inventory of several thousand parts (many nearly identical), a partsman must select the correct ones for a repair job, using each manufacturer's intricate and unique inventory control system. 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 312; AUTO PARTS MAN 50, 65–83, 91–92, 103. They must pore over service bulletins and manuals to maintain their encyclopedic knowledge of parts in the face of rapid technological change. AUTO PARTS MAN 50, 61.

In the course of "requisitioning, . . . and dispensing parts" to mechanics, 29 C.F.R. § 779.372(c)(2), partsmen do automotive manual labor. To assist mechanics, some partsmen measured, tested, adjusted, repaired, and reconditioned parts:

> Parts countermen may use micrometers, calipers, fan-belt measurers, and other devices to measure parts for interchangeability. They may also use coil-condenser testers, spark plug testers, and other types of testing equipment to determine whether parts are defective. In some stores—particularly in small wholesale establishments—they may

> repair parts, using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders.

Automobile Parts Countermen, *in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 312–13.

Partsmen not only measure parts, but also customize their size to fit particular trucks, tractors, farm equipment, and automobiles. Parts "counter clerk[s]" for these vehicles and implements "[m]ay measure engine parts, using precision measuring instruments, to determine whether similar parts may be machined down or built up to required size." EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, *Salesperson, Parts (retail trade; wholesale tr.) alternate titles: counter clerk; parts clerk*, *in* DICTIONARY OF OCCUPATIONAL TITLES § 279.357-062 (4th ed. rev. 1991), https://perma.cc/6BCP-YN5A.

Even partsmen who do not repair or adjust parts still perform automotive manual labor. Parts counters typically open onto shop floors, and many partsmen hand parts over the counter directly to mechanics. Because they quite literally handle parts, they wear T-shirts, coveralls, jumpsuits, or similar work gear, not suits and ties or equivalent business attire. See, for instance, the photograph from DoL's 1966–67 handbook, showing a T-shirt-clad "[a]utomobile parts counterman dispens[ing] [a] part to [a] mechanic" by handing it to him over a counter. 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 313, *reprinted in* App., *infra*, at E3; *cf. Automobile Service Advisors*, *in id.* at 314–15, *reprinted in* App., *infra*, at E2 (showing a service advisor wearing a tie).

Partsmen must work with their hands to "cooperate [with mechanics] in the handling of shop requisitions." AUTO PARTS MAN 50. After the mechanic prepares a requisition for needed parts, the partsman searches through the stock room, grabs the stocked parts, orders those that are not already in stock, and dispenses (hands) the needed parts to the mechanic. *Id.* at 50–51; *see also* App., *infra*, at E3. Thus, as DoL's regulation provides, partsmen both "requisition[]" and "dispens[e]," as well as "stock[]," parts. 29 C.F.R. § 779.372(c)(2).

Partsmen rely on their mechanical expertise to pick and hand the right parts to mechanics at the right time. To ensure that a mechanic is never idle, the partsman organizes the work based on knowledge of what parts the mechanic will need first. AUTO PARTS MAN 51. So, for a transmission repair job, a partsman must know to hand the mechanic the proper "clutch discs, plates, and clutch drum bushing first." *Id.*

In short, partsmen, like mechanics, work with their hands. They serve as mechanics' right-hand men or women. Like mechanics and unlike service advisors, partsmen service automobiles and may have the grease under their fingernails to prove it. *Contra* Pet. Br. 19, 30.

2. *When the Conference Committee Combined the House Version with the Senate's* ***Restrictive*** *Phrase, It Did Not Greatly* ***Expand*** *the Exemption's Scope.* Petitioner's inferences from the combination of "partsman" and "servicing" are particularly strained given the drafting history of the exemption. The version of the exemption that passed the House exempted

partsmen but had no requirement that they be primarily engaged in selling or servicing. H.R. 13,712, 89th Cong. § 209 (Mar. 29, 1966). The Senate Labor Committee removed "partsman" and added the requirement that an exempt salesman or mechanic be "primarily engaged in selling or servicing" a vehicle or farm implement. H.R. 13,712, 89th Cong. § 209 (Aug. 23, 1966). During the floor debate, the Senate adopted a separate clause for "partsmen primarily engaged in selling or servicing farm implements." 112 CONG. REC. 20,506 (Aug. 24, 1966). The Conference Committee then took the list of subjects from the House bill, including partsmen, and combined it with the Senate's restriction to those "primarily engaged in selling or servicing." H.R. REP. NO. 89-2004, at 7 (Sept. 6, 1966) (Conf. Rep.).

If the Conference Committee had meant to *expand* the meaning of "servicing" dramatically, combining the House's list of subjects with the Senate's *restrictive* phrase in conference would have been a remarkably oblique way to do it. The Conference Report reflects no such intention, stating only: "The conference substitute conforms to the House provision regarding partsmen, except that such exemption shall be available only to salesmen, partsmen, and mechanics primarily engaged in selling or servicing such vehicles." *Id.* at 19.

3. *Congress's Focus in Including Partsmen Was on Farm Implements, Not Automobiles.* Congress included partsmen in the exemption after extensive testimony focused on their roles in servicing farm implements as mechanics' right-hand men or women. *Minimum Wage-Hour Legislation: Hearings Before the Subcomm. on Labor Standards of the H. Comm.*

on Educ. & Labor, 86th Cong. 699–711 (1960) (testimony of Paul Milliken, Executive Vice President, National Retail Farm Equipment Association); *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the H. Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 89th Cong. 627–40 (1965) [hereinafter *1965 Hearings*] (statement of National Farm & Power Equipment Dealers Association).

Even a short delay while awaiting equipment repairs could allow a farm's crops to rot, spoil, freeze, or become infested, ruining farmers financially. Harvesting delays cost farmers hundreds, if not thousands, of dollars every single day. Donnell Hunt, *Let's Analyze the Breakdown*, IMPLEMENT & TRACTOR, Apr. 7, 1971, at 22, 28. Thus, mechanics *and* skilled partsmen had to be on call at all hours of the day or night to "make emergency repairs" on "increasingly more complicated [and] highly sophisticated" machinery. *1965 Hearings* 630, 632; *see also* 112 CONG. REC. 20,503 (Sen. Bayh) (citing the need for a trained partsman's knowledge and ability). Like the mechanic, the "parts man [had to be available to] respond[] to the emergency call of a farmer for a badly needed part." *1965 Hearings* 635.

Congress therefore added partsmen to the exemption to accommodate these concerns of farm-implement dealers. The first draft of the 1966 Amendments introduced in the House created an exemption for partsmen who worked at farm-implement dealerships, but not those at automobile and truck dealerships. H.R. 13,712, 89th Cong. § 209 (Mar. 16, 1966). Likewise, after a Senate committee removed partsmen from the exemption, farm-state

Senators insisted on restoring their exemption. With the increasing mechanization of farming, "an infinitesimally small difference between parts can determine whether a machine will work or not. Therefore, the knowledge and ability of the trained partsman is very much in demand." 112 CONG. REC. 20,503 (Sen. Bayh). As Senator Mansfield explained, partsmen "ha[ve] to be available during harvest season—and before and after, to a lesser extent—at all hours of the day." *Id.*

The Senate therefore adopted an amendment exempting "partsmen primarily engaged in selling or servicing farm implements." 112 CONG. REC. 20,506. As the Senators understood, farm-implement partsmen had to work irregular and seasonal hours alongside mechanics.

In short, unlike a service advisor, a partsman is engaged in servicing, performing automotive manual labor as the mechanic's right-hand man or woman. Congress specifically exempted partsmen, not service advisors, recognizing their essential agricultural role.

E. Congress Limited the Exemption to Salesmen, Partsmen, and Mechanics Because of Their Irregular Hours and Locations.

The textual enumeration of three and only three types of dealership employees reflects Congress's considered purpose. Congress enumerated these three types primarily because they often had to work unpredictable hours, including nights and weekends. Unlike other dealership employees working fixed hours on site, salesmen were expected to "go out and sell an Oldsmobile, a Pontiac, or a Buick all day long

and all night." 112 CONG. REC. 20,504 (Sen. Yarborough). As the Senate floor manager of the 1966 amendments explained, "[t]he reason for exempting the salesmen and the mechanics was the difficulty of their keeping regular hours. The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different." *Id.*

Partsmen and mechanics likewise must work irregular hours beyond normal business hours, often seasonally. Several farm-state senators emphasized that "during planting, cultivating and harvesting seasons, [farmers] may call on their dealers for parts at any time during the day or evening and on weekends." 112 CONG. REC. 20,502 (Sen. Bayh). Senator Bayh recounted his own experience of "trying to get my tractor, combine, or corn-picker repaired, for which the mechanic could not find the necessary part; and he had to call the partsman, *get him out of bed*, and get him to come down to the store to show him which part should be used." *Id.* at 20,504 (Sen. Bayh) (emphasis added); *accord id.* at 20,502–04 (Sens. Bayh, Hruska, and Mansfield).

In addition, mechanics and salesmen sometimes work off-site, which makes it "difficult to keep their time records." 112 CONG. REC. 20,505 (Sen. Clark). The Senate floor manager gave the example of "the mechanic [who] goes out and answers calls in the rural areas. . . . who has to go out on the snow-covered field." *Id.* at 20,504 (Sen. Yarborough). "The mechanics and the salesmen . . . . do not get overtime because their work is outside." *Id.* It is "the kind of

work outside the store which gives some excuse, at least, for exempting the salesman and the mechanic." *Id.* at 20,505 (Sen. Clark).

Service advisors did not present either of these concerns. The job type was distinct and known in the industry when the 1966 amendments were drafted and debated. *Automobile Service Advisors*, *in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 314. Service advisors worked on-site in order to "confer[] with the customer to determine his service needs" and "arrange[] for a mechanic to do the work." *Id.* They typically worked relatively fixed schedules of "from 40 to 48 hours a week." *Id.* at 316.

The job does not require irregular, unpredictable, or seasonal hours, or working off-site. So Congress saw no need to exempt service advisors (or any of dozens of other types of dealership employees).

F. As Congress and This Court Understood at the Time, Exemptions from the FLSA's Broad Guarantee of Overtime Should Not Be Expanded Beyond Their Clear Terms

When the salesman/partsman/mechanic exemption was enacted and re-enacted, both Congress and this Court understood that Congress's limited exemptions from the FLSA's overtime-pay guarantee should not be expanded. This Court has long enforced this canon of construction, and Congress adopted the FLSA amendments against this backdrop. Such canons of construction are quintessential "traditional tools of statutory construction" required at *Chevron* step one. *Chevron*, 467 U.S. at 843 n.9; *accord City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J.,

concurring in part and concurring in the judgment). The decision below briefly and correctly adverted to this canon. Pet. App. 6–8 & n.3, 11.

1. *This Court's FLSA Canon Requires Reading FLSA Exemptions Narrowly.* "The [FLSA] declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission." *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950) (footnote omitted). "Where exceptions were made, they were narrow and specific." *Id.* at 517.

Thus, for more than half a century, this Court has read FLSA exemptions narrowly, declining to expand them beyond their plain terms. As Justice Harlan observed, "It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell* v. *Ky. Fin. Co.*, 359 U.S. 290, 295 (1959). Hence, their "application [is] limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). This FLSA-specific canon dates to this Court's earliest decisions interpreting the statute. *See A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945).

The FLSA-exemption canon is a specific application of this Court's more general rule that when Congress establishes a general mandate, exceptions should be "narrowly construed." *E.g.*, *Milner* v. *Dep't of Navy*, 562 U.S. 562, 565 (2011) (Freedom of Information Act exemptions); *see Chickasaw Nation* v. *United States*, 534 U.S. 84, 95 (2001) (noting canon that tax exemptions must be "clearly expressed"); *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (reiterating "well-known" canon that exceptions to discharge in

bankruptcy "should be confined to those plainly expressed" (quoting *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915))).

2. *Congress Legislated Against the Backdrop of This Court's Canon.* When Congress passed the 1966 and 1974 FLSA amendments, including § 213(b)(10), this FLSA canon was, in Justice Harlan's words, a "well settled" background principle. *Mitchell*, 359 U.S. at 295.

When considering other statutory-interpretation questions, this Court frequently looks to well-settled background principles to illuminate Congress's intent. *See, e.g.*, *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (issue preclusion); *Bond* v. *United States*, 134 S. Ct. 2077, 2092 (2014) (presumption against encroaching on traditional state domains); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (presumption against extraterritorial application of statutes). For example, "Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014). The same is true here.

Congress legislated against this backdrop and relied upon it. In keeping with this canon, a key member of Congress explained that the salesman/partsman/mechanic exemption would be construed narrowly. In 1967, Congress began considering revisions to the exemption, in what eventually became the 1974 amendments. The House floor manager of the 1966 amendments, Representative John Dent, explained to a boating industry representative that the revised

exemption would have to be narrowly construed, like the existing one: "This bill would not go down to the level of the employees around the marinas, for instance, but would only, *as it is now written*, I am sure, *be strictly interpreted* to mean only those who are salesmen, partsmen and mechanics, the same as the automobile industry and the farm implement industries [that] are so exempt." *Amendment to Exempt Employees of Boat Sales Establishments: Hearing Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. and Labor*, 90th Cong. 5 (1967) (emphases added).

In short, at *Chevron* step one, service advisors are "primarily engaged" neither in "selling . . . automobiles" nor in "servicing automobiles." "Servicing" requires automotive manual labor, not just selling services. The first subject "salesman" naturally goes with the first gerund "selling," just as the last noun "mechanic" naturally goes with the last gerund "servicing." The statute itself compels the conclusion, reflected in DoL's consistent regulations, that service advisors are *not* exempt from the FLSA's overtime requirement.

II. At *Chevron* Step Two, DoL Reasonably Declined to Expand the Statutory Exemption to Service Advisors

Even if the statute permitted petitioner's countertextual reading of the salesman/partsman/mechanic exemption, it would hardly compel it or make the contrary conclusion unreasonable. At *Chevron* step two, DoL's interpretation of the statute is reasonable and warrants deference. The agency's "view governs

if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

This is a textbook case for *Chevron* deference. DoL is in the best position to use its technical expertise to resolve any ambiguity in the salesman/partsman/mechanic exemption. This Court, in *Long Island Care*, recognized DoL's delegated authority to interpret the FLSA amendments. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007). DoL, not the courts, is best situated to weigh policy tradeoffs and engage in any line drawing.

A. *Chevron* Provides the Applicable Standard

Petitioner's half-hearted effort to dispute whether the *Chevron* framework applies here is meritless. Congress granted DoL authority "to promulgate necessary rules, regulations, or orders with regard to the [FLSA] amendments" in both the 1966 and 1974 FLSA Amendments, which enacted and re-enacted the salesman/partsman/mechanic exemption. Pub. L. No. 89–601, § 602, 80 Stat. at 844; *accord* Pub. L. No. 93–259, § 29(b), 88 Stat. at 76, *both reprinted in* App., *infra*, at A2. In *Long Island Care*, this Court relied on the latter provision in holding that another DoL notice-and-comment regulation merited *Chevron* deference. 551 U.S. at 165. Since "Congress delegated authority to [DoL] generally to make rules carrying the force of law," and the 2011 notice-and-comment regulation "was promulgated in the exercise of that authority," *Chevron* governs. *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001).

Petitioner appears to argue (at 36) that *Chevron* deference depends on a particularized delegation that mentions the specific provision at issue in this case. But *Chevron* deference "does not turn on whether Congress's delegation of authority was general or specific." *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 57 (2011); *accord City of Arlington*, 133 S. Ct. at 1874 ("[A] general conferral of rulemaking or adjudicative authority has [never] been held insufficient to support *Chevron* deference . . . .").

The 2011 notice-and-comment regulation is legislative. *Contra* Pet. Br. 36. "Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citation omitted). But even if it were interpretive, it would still merit *Chevron* deference. As petitioner concedes, "the *Chevron* framework applies to interpretive regulations, including those promulgated under the FLSA." Cert. Reply Br. 5 (citing *Long Island Care*, 551 U.S. at 171–72 and *Mayo Found.*, 562 U.S. at 52–58). DoL's regulation must thus be analyzed under the *Chevron* framework.

B. DoL Reasonably Heeded the Weight of the Comments on the Proposed Provision

DoL followed proper rulemaking procedures here. It issued a notice of proposed rulemaking, solicited and received comments, and weighed them before issuing its notice-and-comment regulation. This notice-and-comment process "is designed to assure due deliberation," and indeed, DoL deliberated for almost three years. *Smiley* v. *Citibank (S.D.), N.A.*,

517 U.S. 735, 741 (1996); *see* 5 U.S.C. § 553. In promulgating its final rule, DoL acknowledged the "strongly held views" on the issues and "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed. Reg. at 18,832. Its consideration included prior judicial opinions and legislative history. *Id.* at 18,838. Though petitioner asserts (at 21, 41) that DoL "complete[ly] lack[ed] [] justification" for reaffirming its 1970 rule and offered no "language explaining the change and accounting for reliance interests," DoL explained its decision with care and responded to the comments it received. App., *infra*, at C1–C6.

Petitioner's own amicus raised the same policy concerns during DoL's rulemaking, including reliance, that petitioner and its amici raise here. DoL considered and ultimately rejected these arguments. After DoL promulgated its final notice-and-comment regulation but before it went into effect, petitioner or its amici could have challenged it under the Administrative Procedure Act, 5 U.S.C. § 702, but chose not to do so. Instead, they now seek to overturn the notice-and-comment rulemaking process by relitigating the same policy concerns that the agency already considered in its rulemaking.

1. *DoL Heeded Commenters' Observations About Improper Lower-Court Reasoning.* In its notice of proposed rulemaking, DoL acknowledged that some lower courts had exempted service advisors on the theory that they are "'functionally similar'" to mechanics and partsmen and work as an "'integrated unit'" with them. 73 Fed. Reg. at 43,658 (quoting *Deel Motors*, 475 F.2d at 1097), *reprinted in* App.,

infra, at B3. Two of the seven comments that addressed the issue urged DoL to follow *Deel Motors* and its progeny, but the majority of comments criticized this reasoning as misreading the statute. 76 Fed. Reg. at 18,838 (summarizing comments). DoL agreed with commenters that, contrary to lower-court reasoning, the regulation was consistent with the statute. *Id.*, *reprinted in* App., *infra*, at C3–C5.

2. *DoL Fully Considered the Industry's Stated Reliance Concerns.* DoL also considered the industry's claimed reliance on non-binding agency enforcement materials. Petitioner's amicus asserted then, as it does now, that the dealership industry had "long relied" on the 1978 opinion letter. *See* National Automobile Dealers' Association, Comment Letter 1 (Sept. 26, 2008), http://tinyurl.com/oyjbwoq. DoL acknowledged amicus's claim that its members "ha[d] relied upon the Administrator's 1978 opinion letter," but concluded that its understanding of the statute and its policies outweighed that interest. *See* 76 Fed. Reg. at 18,838, *reprinted in* App., *infra*, at C3–C4.

3. *DoL Considered Other Indications of Congress's Intent.* Twelve members of Congress, including the chairs of the four relevant House and Senate committees and subcommittees, opposed exempting service advisors, based on congressional intent. They explained that, in enacting the overtime exemption, Congress "only intended to exempt 'salesmen' who sell automobiles and 'mechanics' who service automobiles," not "service employees who sell mechanical services." George Miller et al., Comment Letter 7–8 (Sept. 26–27, 2008), http://tinyurl.com/gu4f7ne. Congress's "understanding was that a car 'salesman'

sells automobiles, and that a salesman does not service automobiles or sell mechanical services." *Id.*, *reprinted in* App., *infra*, at C4.

Three other commenters traced the legislative history of the provision, noting the exemption's precise limitations. DoL agreed that the automobile dealership provision "limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838, *reprinted in* App., *infra*, at C6.

Thus, in concluding that "[then-]current [29 C.F.R. §] 779.372(c) sets forth the appropriate approach to determining whether [service advisors] are subject to the exemption," DoL carefully considered all the comments, repromulgating its 1970 interpretation as a notice-and-comment regulation. *Id.*

C. After Temporarily Acquiescing to Contrary Lower Court Case Law, DoL Acted Reasonably in 2011 by Repromulgating its 1970 Rule as a Notice-and-Comment Regulation

1. *DoL's Temporary Enforcement Acquiescence Never Changed Its Regulation.* DoL acted reasonably in reaffirming its longstanding 1970 rule through its 2011 notice-and-comment regulation. Both the 1978 opinion letter and the 1987 Field Operations Handbook were nonbinding documents in which DoL said it would decline to enforce this part of the regulation, after pre-*Chevron* reported decisions by one circuit and three district courts had (erroneously) determined that the agency's interpretation was not "the best." *Deel Motors*, 475 F.2d at 1097; Pet. Br. 9–11 & nn.2, 3. The 1987 handbook, which petitioner

relies on, was an internal agency enforcement document. As DoL itself states, it "is not used as a device for establishing interpretative policy." U.S. DEP'T OF LABOR, WAGE & HOUR DIV., REV. NO. 559, FIELD OPERATIONS HANDBOOK at foreword -1 (Apr. 4, 1988).

Unlike "notice-and-comment rulemaking, . . . [i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000). This Court has held that similar opinion letters did not prevent an agency from taking a contrary position through rulemaking. *Smiley*, 517 U.S. at 743. Any effect these earlier materials may have had was erased by the 2008–2011 notice-and-comment rulemaking, which took a closer, more formal, and more comprehensive look at the issue.

2. *Regardless, Under* Chevron, *Agencies Are Free to Change Their Positions.* Even if the 2011 regulation had been a formal change of position, that would not matter. Under *Chevron* step two, agencies are free to change course so long as they provide reasoned explanations for doing so. "[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal." *Smiley*, 517 U.S. at 742. "[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.*; *accord Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

In *Chevron* itself, this Court upheld an agency's change of position. 467 U.S. at 863–64. "An initial agency interpretation is not instantly carved in stone." *Id.* at 863.

Petitioner's complaint (at 11) that the 2011 final rule did not "adopt[] the proposed regulation," but instead "changed course" and adhered to DoL's earlier view, completely misunderstands the rulemaking process. An agency is in no way obligated to adopt regulations it floats in a notice of proposed rulemaking. To the contrary, the point of the notice is to give the agency, and affected parties, the opportunity to consider whether the proposal should be accepted. Choosing not to adopt a proposed rule is valid as a "logical outgrowth" of a proposal. *Long Island Care*, 551 U.S. at 174–75.

3. *Applying Duly Promulgated Regulations Is Not Retroactive.* Petitioner argues that DoL's change of position amounts to "impos[ing] significant retroactive liability for settled industry practices." Br. 22; *accord id.* at 3, 18, 42, 43; *see also id.* at 3, 43 (citing *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012), which rejected a novel DoL litigation position staked out for the first time in an amicus brief, not a notice-and-comment regulation).

Contrary to petitioner's claim, there is nothing "retroactive" about applying the 2011 notice-and-comment regulation to post-2011 conduct. As this Court recognized in *Long Island Care*, the notice-and-comment process itself gives regulated parties ample notice. Particularly because "the Department [of Labor's] recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any

[unfair] surprise unlikely here[,] the change in interpretation alone presents no separate ground for disregarding the Department [of Labor]'s present interpretation" of the FLSA overtime exemption. *Long Island Care*, 551 U.S. at 170–71 (citation omitted). And DoL gave employers an extra margin of fair notice, providing that its regulation would not take effect until thirty days after its issuance. App., *infra*, at C1.

Moreover, Congress has already provided statutory protections that allay any retroactivity concerns. The Portal-to-Portal Act provides an affirmative defense for employers who relied on prior DoL interpretations. 29 U.S.C. § 259. Congress has thus addressed the precise good-faith "reliance" interests raised by petitioner (at 3, 21, 36, 40, 41, 43). If there were any concern about conduct predating the 2011 regulation, the district court on remand could consider the applicability of a statutory reliance defense. But as petitioner has neither pleaded nor proved this defense below, it is not properly before this Court.

Unlike petitioner's amorphous reliance argument, the Portal-to-Portal Act defense does not permit employers to rely on DoL interpretations indefinitely, but instead applies only until the "interpretation, practice, or enforcement policy is modified or rescinded." 29 U.S.C. § 259. DoL's issuance of its final regulation on April 5, 2011 forecloses any claim of continued reliance beyond its effective date.

D. Employers Cannot Evade the FLSA's Protections by Paying Employees on Commission Without Satisfying Another FLSA Exemption's Specific Requirements

1. *Employers Cannot Circumvent the FLSA's Overtime Requirement Simply by Paying on Commission.* Petitioner's assertion that an employer may have "negotiated" compensation with employees (Pet. 3, 17, 30, 33, 34) is of no significance. Employers cannot evade the overtime requirement simply by hiring employees on a piecework or commission basis. Unless employees fall within an enumerated exception to the FLSA's broad overtime-pay guarantee, they are entitled to overtime.

Nor may petitioner complain that it failed "to strictly track the number of hours worked." Br. 44; *see* J.A. 41. The FLSA has long required employers to keep careful wage and hour records, regardless of how they pay their employees. 29 U.S.C. § 211(c). Enforcing the law against employers who breach their statutory recordkeeping duties creates no "windfall" (Pet. Br. 44), but simply implements the statutory remedies. Petitioner's worry rings particularly hollow here, as petitioner required respondents to work fixed shifts on-site, from 7 a.m. to 6 p.m., five days per week. J.A. 39, 41.

Contrary to petitioner's apparent argument (at 20, 38, 39, 42, 43–44), commission pay is neither necessary nor sufficient to qualify for the salesman/partsman/mechanic exemption. The exemption nowhere mentions commissions or other methods of pay. As for the positions exempted, automobile mechanics and partsmen were (and are) paid in a variety

of ways: hourly wages, salaries, commissions, or some combination of these. *Automobile Parts Countermen, in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 314; *Automobile Mechanics, in id.* at 477, 480. Farm equipment salesmen had varying pay arrangements, with about a third on salary alone, at most a ninth on commission alone, and more than half on some combination. *More About Compensating Salesmen*, IMPLEMENT & TRACTOR, Feb. 7, 1974, at 10, 11, 49 (reporting surveys from 1964 and 1973). Conversely, petitioner concedes that automobile insurance salesmen, warranty salesmen, and underbody coating salesmen are not exempt, whether or not they are paid on commission. Cert. Reply Br. 7 n.2.

In short, the method of calculating compensation has nothing to do with whether a given employee falls within the salesman/partsman/mechanic exemption. And in any event, service advisors are paid in myriad ways. Some are paid on commission, others are paid salaries or by the hour, and others receive a combination of salary or hourly wages plus commission. *Automobile Service Advisors, in* 1966–67 OCCUPATIONAL OUTLOOK HANDBOOK 316; Pet. Br. 13 n.4 (conceding the range of compensation packages). None of this has anything to do with the issue here.

2. *Commissioned Employees May Fall Within a Different FLSA Exemption, Not the Dealership Exemption.* While the salesman/partsman/mechanic exemption does not refer to compensation or commissions at all, the FLSA does include a different exemption covering a variety of commissioned retail and service employees: 29 U.S.C. § 207(*i*). That provision requires the employer to prove that the

employees (a) work for a "retail or service establishment"; (b) earn more than one-and-a-half times the minimum wage; and (c), receive more than half of their compensation as "commissions on goods or services" over a "representative period" of at least "one month." *Id.* Commission-based employees who do not satisfy these requirements, such as those paid a percentage of regularly predictable sales with only a small increment for sales above expected sales, are entitled to overtime pay. 29 C.F.R. § 779.416(c).

The *expressio unius* canon cautions against expanding such carefully limited exemptions. Yet petitioner repeatedly inverts the *expressio unius* inference. It seeks to expand § 207(*i*)'s express statutory exemption for certain commission-based employees into an implied exemption for service advisors, whether they are paid salaries, commissions, or both. Br. 6, 20–21, 38; *see also id.* at 13 n.4 (noting that some service advisors receive salaries or hourly wages). Petitioner likewise seeks to expand an express statutory exemption for certain outside sales employees who must travel away from the workplace into an implied exemption for other employees who make sales, even if they do so exclusively within the workplace. Br. 6, 20–21, 38 (analogizing to 29 U.S.C. § 213(a)(1)). These maneuvers would subvert the terms of each specific exemption.

3. *The § 207(i) Exemption Further Allays Petitioner's Concerns About Reliance and Industry Disruption.* Applying the statute and regulation as written will not unsettle expectations or disrupt the dealership industry. *Contra* Pet. Br. 41–45. As a law firm reassured its California automobile dealership clients, a

ruling that service advisors are entitled to overtime should not cause "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with . . . Section 207(i)." Navarro *Decision Should Have Little Effect on California Auto Dealers*, SCALI L. FIRM (Mar. 29, 2015), https://perma.cc/ML5W-8T8X.

Industry experts confirm this reassurance. As an automobile-dealership-industry website summarized, "[c]onsidering that most dealerships pay their service advisers using some sort of commission or flat-rate pay plan specifically designed to qualify the service adviser for the [§ 20]7(i) commissioned sales exemption, . . . the *Navarro* decision [below] likely affects very few, if any, employers." John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators After* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), https://perma.cc/DW2C-JMBP.

Thus, applying the overtime-pay requirement to service advisors—just as it applies to automobile dealership sales managers, warranty salesmen, financing salesmen, insurance salesmen, leasing agents, advertisers, Internet marketers, cashiers, receptionists, lot boys, parts runners, car washers, dispatchers, and porters—will not be disruptive.

DoL is in the best position to interpret any possible ambiguities in the FLSA as it applies to the ever-changing automobile dealership industry. As this Court has recognized, "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley*,

517 U.S. at 742. In short, at *Chevron* step two, DoL acted reasonably in repromulgating its consistent regulatory position as a notice-and-comment regulation.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

KEVEN STEINBERG
THOMPSON, COE & O'MEARA
12100 Wilshire Blvd.
Suite 1200
Los Angeles, CA 90025
(310) 954–2362

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(215) 746–2297
sbibas@law.upenn.edu

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APPENDICES

Appendix A

Fair Labor Standards Amendments of 1966
Pub. L. No. 89–601, § 209, 80 Stat. 830, 836
(codified at 29 U.S.C. § 213(b)(10) (1966))

TITLE II—REVISION OF EXEMPTIONS

* * * * *

Automobile, Aircraft, and Farm Implement Sales Establishments

Sec. 209.

(a) Section 13(a)(19) of such Act is repealed.

(b) Section 13(b) of such Act is amended by inserting after paragraph (9) the following new paragraph in lieu of the paragraph repealed by section 212(a) of this Act:

> "(10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or"

Fair Labor Standards Amendments of 1966
Pub. L. No. 89–601, § 602, 80 Stat. 830, 844

TITLE VI—MISCELLANEOUS

* * * * *

Effective Date

Sec. 602.

Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.

Fair Labor Standards Amendments of 1974
Pub. L. No. 93–259, § 29, 88 Stat. 55, 76

Effective Date

Sec. 29.

(a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Appendix B

2008 Notice of Proposed Rulemaking
73 Fed. Reg. 43,654, 43,658–59 (July 28, 2008)

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 4, 531, 553, 778, 779, 780, 785, 786, and 790

RIN 1215-AB13

Updating Regulations Issued Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: In this proposed rule, the Department of Labor (Department or DOL) proposes to revise regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation or court decisions. These proposed revisions will conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

* * * * *

7. *Fair Labor Standards Act Amendments of 1974*

A. Service Advisors Working for Automobile Dealerships and Boat Salespersons

On April 7, 1974, Congress enacted an amendment to section 13(b)(10)(B) of the FLSA, 29 U.S.C. 213(b)(10)(B). Public Law No. 93–259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. This proposed rule revises 29 CFR part 779, Subpart D–Exemptions for Certain Retail or Service Establishments, so that the regulations implementing section 13(b)(10)(B) conform to this 1974 amendment. Section 779.371(a) is revised to reflect the amendment's addition of boat salespersons to the exemption. Proposed § 779.372(a) now clarifies that salespersons primarily engaged in selling trailers, boats, or aircraft, but not partsmen or mechanics for such vehicles, are covered by the exemption; portions of § 779.372(b) and (c) also are changed accordingly.

Section 13(b)(10)(A) of the FLSA provides that "any salesman, partsman, or mechanic engaged in selling or servicing automobiles, trucks or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" shall be exempt from the overtime requirements of the Act. 29 U.S.C. 213(b)(10)(A). The current regulation at 29 CFR 779.372(c)(4) states that an employee described as a service manager, service writer, service advisor, or service salesman, is not exempt under section 13(b)(10)(A).

Uniform appellate and district court decisions, however, hold that service advisors are exempt under

section 13(b)(10)(A) because they are "salesmen" who are primarily engaged in "servicing" automobiles. *See, e.g., Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004) (The current regulatory interpretation of this exemption is "an impermissibly restrictive construction of the statute."); *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973) (Service advisors are "functionally similar to the mechanics and partsmen who service the automobiles. All three work as an integrated unit, performing the services necessary * * * with the service salesman coordinating these specialties."); *Brennan* v. *North Brothers Ford, Inc.*, 1975 WL 1074 at *3 (E.D. Mich. 1975) (unpublished) ("The spirit of 13(b)(10) is best fulfilled by recognizing the functional similarity of service salesmen to partsmen and mechanics which are both expressly exempted."), *aff'd sub. nom. Dunlop* v. *North Brothers Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table).

Based upon the court decisions, the Wage and Hour Division has adopted an enforcement position since 1987 that Wage and Hour "will no longer deny the [overtime] exemption for such employees," and that the regulation would be revised. *See* Wage and Hour Division Field Operations Handbook (FOH) section 24L04(k). Therefore, this proposed rule changes § 779.372(c), entitled "Salesman, partsman, or mechanic," to follow the courts' consistent holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) is revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) is rewritten to clarify that such employees qualify for the exemption.

Appendix C

2011 Final Regulation
76 Fed. Reg. 18832, 18837–38 (Apr. 5, 2011)

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 4

Wage and Hour Division

29 CFR Parts 516, 531, 553, 778, 779, 780, 785, 786, and 790

RIN 1215–AB13, 1235–AA00

Updating Regulations Issued Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Labor (Department or DOL) revises regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation. These revisions conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

DATES: *Effective Date*: These rules are effective on May 5, 2011.

* * * * *

7. *Fair Labor Standards Act Amendments of 1974*

A. Service Advisors Working for Automobile Dealerships and Boat Salespersons

On April 7, 1974, Congress enacted an amendment to section 13(b)(10) of the FLSA, 29 U.S.C. 213(b)(10). Public Law 93–259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. The proposed rule revised 29 CFR part 779, Subpart D—Exemptions for Certain Retail or Service Establishments—to conform the regulations to this 1974 amendment. Section 779.371(a) was revised to reflect the amendment's addition of boat salespersons to the exemption. Proposed § 779.372(a) clarified that "any salesman, partsman, or mechanic" primarily engaged in selling or servicing automobiles, trucks, or farm implements are covered by the exemption; and that salespersons primarily engaged in selling trailers, boats, or aircraft are also exempt, but not partsmen or mechanics for such vehicles. Portions of § 779.372(b) and (c) were also changed accordingly.

Section 13(b)(10)(A) of the FLSA provides that "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" shall be exempt from the overtime requirements of the Act. 29 U.S.C. 213(b)(10)(A). The current regulation at 29 CFR

779.372(c)(4) states that an employee described as a service manager, service writer, service advisor, or service salesman who is not primarily engaged in the work of a salesman, partsman, or mechanic is not exempt under section 13(b)(10)(A).

As discussed in the preamble to the proposed rule, three appellate courts have held that service advisors are exempt under section 13(b)(10)(A) because they are "salesmen" who are primarily engaged in servicing automobiles. 73 FR 43658 (Jul. 28, 2008). Based upon the two earliest court decisions, the Wage and Hour Division in 1978 recognized in an Administrator-issued opinion letter that in certain circumstances service advisors or writers "can be properly regarded as engaged in selling activities." *See* Wage and Hour Opinion Letter WH–467, 1978 WL 51403 (July 28, 1978). The opinion letter noted, however, that this "would not be true in the case of warranty work, since the selling of the warranty is done by the vehicle salesman when the vehicle is sold, not by the service writer." Therefore, the NPRM proposed to change § 779.372(c), titled "Salesman, partsman, or mechanic," to follow the courts' holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) was revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) was rewritten to clarify that such employees qualify for the exemption.

A number of commenters addressed this issue. The National Automobile Dealers Association stated that the retail automobile and truck dealership

industry has relied upon the Administrator's 1978 opinion letter and that it supported the proposed clarification that such employees are exempt. Littler Mendelson, P.C., similarly stated that it supported the change, because it "will eliminate confusion resulting from the inconsistency between the [Field Operations Handbook] and the current regulatory guidance, and is not a change in the law."

Other commenters disagreed with the proposed rule. The AFL–CIO stated that the proposal ignored congressional intent "to carve a narrow exemption for salesmen who work at automobile dealerships." The AFL–CIO, NELA, and NELP traced the legislative history, focusing on the addition of the requirement that the salesman must be "primarily engaged in selling or servicing such vehicles." These commenters disagreed with the court decisions interpreting the exemption, stating that service advisors merely coordinate between customers and the mechanics who actually perform the services, and that the exemption should not be extended to employees outside its plain language simply because they are "functionally similar" to an exempt employee. The AFL–CIO concluded that "neither integration with exempt employees nor the performance of functions related to those of exempt employees qualifies an employee as one who is *primarily engaged in either selling or servicing vehicles*." (Emphasis in original). NELA concluded that the exemption "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle, as *Walton* concluded." Comments submitted by Members of the United States Congress similarly opposed the Department's proposal, stating that the

1966 exemption only exempts salesmen who sell automobiles and mechanics who service automobiles, and not salesmen who sell services. They stated that the Department's proposal "would abandon its longstanding and correct interpretation of Section 13(b)(10)," and would ignore the Supreme Court's command to construe FLSA exemptions narrowly. *Id.*

The AFL–CIO stated that, if the Department does treat service writers as salesmen primarily engaged in servicing vehicles, then it urged the Department to exclude any time spent in "selling" warranty work from the determination of whether the writer has spent the majority of his time in selling, since that right to free parts and service has already been sold by the salesman of the vehicle. NELA stated that the proposed regulatory text was confusing because it appears to exempt service writers only if they are selling the servicing of vehicles that the dealership sells, which would be difficult for both the employee and the employer to know. Both NELP and the North Carolina Justice Foundation commented that the proposal exempts service writers based upon their job title alone, rather than based upon an analysis of their actual job duties, which is contrary to the requirement to look at the circumstances of the whole activity.

Upon further consideration of the issue, the Department has decided not to adopt the proposed change to § 779.372(c)(4) to specifically include service managers, service writers, service advisors, or service salesmen as qualifying for exemption. As commenters point out, the statute does not include such positions and the Department recognizes that

there are circumstances under which the requirements for the exemption would not be met. The Department notes that current § 779.372(c)(1) is based on its reading of 13(b)(10)(A) as limiting the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles. The Department believes that this interpretation is reasonable and disagrees with the Fourth Circuit's conclusion in *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004), that the regulation impermissibly narrows the statute. Therefore, the Department has concluded that current 779.372(c) sets forth the appropriate approach to determining whether employees in such positions are subject to the exemption. However, the final rule adopts § 779.372(a)–(b) as proposed.

Appendix D

Federal Statutory Provisions That Are Phrased at Least in Part Distributively (*e.g.*, not all the nouns pair with all the verbs)

Appendix D-1

53 Distributively Phrased Statutes in Which the Number of Words in the First List Does Not Equal the Number of Words in the Second List

49 U.S.C. § 30301(4) — "[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."

49 U.S.C. § 31301(12) — "[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated only on a rail line or custom harvesting farm machinery."

49 U.S.C. § 13102(16)	"The term 'motor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service."
16 U.S.C. § 742c(e)	"The Secretary is authorized under such terms and conditions and pursuant to regulations prescribed by him to use the funds appropriated under this section to make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost, destroyed,* or damaged by the earthquake of March 27, 1964, and subsequent tidal waves related thereto ...."
16 U.S.C. § 428i	"or shall *cut down* or *fell* or **remove** any ***timber***, **battle relic**, ***TREE***, or ***TREES GROWING*** or **being** upon such battlefield ...."

16 U.S.C. § 430q	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES*** ***GROWING*** or **being** upon said park ...."
16 U.S.C. § 425g	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES*** ***GROWING*** or **being** upon said park ...."
16 U.S.C. § 426i	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES*** ***GROWING*** or **being** upon such battlefield ...."
16 U.S.C. § 423f	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE*** or ***TREES*** ***GROWING*** or **being** upon said battlefield ...."
16 U.S.C. § 430i	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES*** ***GROWING*** or **being** upon said park ..."
16 U.S.C. § 430h	"or shall *cut down* or *fell* or ***remove*** any ***timber***, **battle relic**, ***TREE***, or ***TREES*** ***GROWING*** or **being** upon said park ...."
43 U.S.C. § 952	"Any *person*, livestock company, or **transportation corporation** engaged in ***breeding***, ***grazing***, ***driving***, *or* ***transport-***

	ing livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir ...."
42 U.S.C. § 7384n(c)(4)	"In the case of an atomic weapons employee described in section 7384*l*(3)(B) of this title, the following doses of radiation shall be treated, for purposes of paragraph (3)(A) of this subsection, as part of the radiation dose received by the employee at such facility: (A) Any dose of ionizing radiation received by that employee from *facilities*, ***materials***, ***devices***, or byproducts *used* or generated in the research, development, production, dismantlement, transportation, or testing of nuclear weapons, or from any activities to research, produce, process, store, remediate, or dispose of radioactive materials by or on behalf of the Department of Energy ..."
Burmese Freedom and Democracy Act of 2003,	"The SPDC has demonstrably failed to cooperate with the United States in stopping the flood of *heroin* and metham-

Pub. L. 108-61, § 2(8), 117 Stat. 864	phetamines being *grown*, *refined*, *manufactured*, and *transported* in areas under the control of the SPDC serving to flood the region and much of the world with these illicit drugs."
22 U.S.C. § 3929(b)	"Inspections, investigations, and audits conducted by or under the direction of the Inspector General shall include the systematic review and evaluation of the administration of activities and operations of Foreign Service posts and bureaus and other operating units of the Department of State, including an examination of-- (1) whether *financial transactions* and accounts are properly *conducted*, *maintained*, and *reported* ...."
42 U.S.C. § 1592e	"The Secretary of Housing and Urban Development may, in his discretion, upon request of the Secretary of Defense or his designee, transfer to the jurisdiction of the Department of Defense without reimbursement any land, *improvements*, *housing*, or *community facilities* *constructed* or acquired under the

provisions of this subchapter and considered by the Department of Defense to be required for the purposes of the said Department."

15 U.S.C. § 272(e)(1) — "In carrying out the activities under subsection (c)(15), the Director-- ... (B) shall not prescribe or otherwise require ... (iii) that information or communications technology *products* or services be *designed*, *developed*, or *manufactured* in a particular manner."

15 U.S.C. § 636(b)(15) — "[The Small Business Administration] may make any loan for *repair*, *rehabilitation*, or *replacement* of property *damaged* or destroyed without regard to whether the required financial assistance is otherwise available from private sources ...."

22 U.S.C. § 2779a(d)(1) — "[T]he term 'offset agreement' means an agreement, arrangement, or understanding between a United States supplier of defense articles or defense services and a foreign country under which the supplier agrees to purchase or acquire, or to promote the purchase or acquisition by other United States

persons of, *goods* or services *produced*, *manufactured*, *grown*, or *extracted*, in whole or in part, in that foreign country in consideration for the purchase by the foreign country of defense articles or defense services from the supplier ...."

31 U.S.C. § 3801(b)(2) "[E]ach claim for property, services, or money is subject to this chapter regardless of whether such *property*, *services*, or *money* is actually *delivered* or paid ...."

12 U.S.C. § 632 "Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the Act of October 6, 1917, as amended, or any *actions*, REGULATIONS, RULES, ORDERS, or PROCLAMATIONS *taken*, promulgated, made, or ISSUED pursuant to any of such statutes."

5 U.S.C. § 504(a)(2) "A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows

that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any *attorney*, *agent*, or expert witness *representing* or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed."

16 U.S.C. § 572(c) "That when by the terms of a written agreement either party thereto furnishes materials, supplies, equipment, or services for fire emergencies in excess of its proportionate share, adjustment may be made by reimbursement or by replacement in kind of *supplies*, *materials*, and equipment *consumed* or destroyed in excess of the furnishing party's proportionate share."

22 U.S.C. § 8123(b)(2) "A judge of the United States shall promptly issue an administrative search warrant authorizing the requested complementary access upon an affidavit submitted by the United

States Government ... (F) listing the *items*, *documents*, and *areas* to be *searched* and seized ..."

22 U.S.C. § 6725(b)(2) "The judge of the United States shall promptly issue a warrant authorizing the requested inspection upon an affidavit submitted by the United States Government showing that ... (D) the *items*, *documents*, and *areas* to be *searched* and seized ..."

47 U.S.C. § 155(c)(3) "Any *order*, *decision*, *report*, or action *made* or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission."

47 U.S.C. § 155(c)(4) "Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by

the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any *order*, *decision*, *report*, or action *made* or taken pursuant to any delegation under paragraph (1) of this subsection."

47 U.S.C. § 155(c)(7) "The filing of an application for review under this subsection shall be a condition precedent to judicial review of any *order*, *decision*, *report*, or action *made* or taken pursuant to a delegation under paragraph (1) of this subsection."

16 U.S.C. § 916g(a) "Subject to the provisions of the convention, any person authorized to enforce ... the regulations of the Secretary of Commerce may seize, whenever and wherever lawfully found, all *whales* or whale products *taken*, *processed*, or *possessed* contrary to the provisions of the [International Convention for the Regulation of Whaling] ...."

16 U.S.C. § 668b(c)	"That all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this subchapter, be *exercised* or **performed** ...."
16 U.S.C. § 670j(d)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Department of the Treasury shall, for the purposes of this section, be *exercised* or **performed** ...."
16 U.S.C. § 2439(e)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Customs Service may, for the purposes of this chapter, also be *exercised* or **performed** ...."
16 U.S.C. § 3374(b)	"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department may, for the purposes of this chapter also be *exercised* or **performed** ...."

16 U.S.C. § 2409(e)

"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Customs Service may, for the purposes of this chapter, also be ***exercised*** or **performed** ...."

16 U.S.C. § 742j-1(f)

"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this section, be ***exercised*** or **performed** by the Secretary of the Interior or by such persons as he may designate."

16 U.S.C. § 1540(e)(5)

"except that all *powers*, rights, and **duties** ***conferred*** or **imposed** by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be ***exercised*** or **performed** by the Secretary or by such persons as he may designate."

15 U.S.C. § 77jjj(a)(3)

"If the indenture to be qualified requires or permits the appointment of one or more co-trustees in addition to such institutional trustee, the *rights*, powers, **duties**, and OBLIGATIONS

CONFERRED or **IMPOSED** upon the trustees or any of them shall be ***CONFERRED*** or **IMPOSED** upon and ***exercised*** or **PERFORMED** by such institutional trustee, or such institutional trustee and such co-trustees jointly ..."

8 U.S.C. § 1104(a)

"He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the *powers*, functions, or **duties** ***conferred*** or **imposed** by this chapter or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service."

50 U.S.C. § 4556(b)

"The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any *right*, liability, or **offense** ***incurred*** or

committed prior to the termination date of such title or of such rule, regulation, or order."

33 U.S.C. § 702i

"The provisions of sections 407, 408, 411, 412, and 413 of this title are made applicable to all *lands*, *waters*, *easements*, and other *property* and *rights acquired* or constructed under the provisions of sections ... of this title."

15 U.S.C. § 13(d)

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any *products* or commodities *manufactured*, *sold*, or *offered for sale* by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

23 U.S.C. § 403(c)(1)	"[T]he Secretary is authorized to carry out, on a cost-shared basis, collaborative research and development with ... (A) non-Federal entities, including State and local governments, *colleges*, *universities*, *corporations*, partnerships, sole proprietorships, *organizations*, and *trade associations* that are *incorporated* or established under the laws of any State or the United States ...."
33 U.S.C. § 2313(a)	"For the purpose of improving the state of engineering and construction in the United States and consistent with the civil works mission of the Army Corps of Engineers, the Secretary is authorized to utilize Army Corps of Engineers laboratories and research centers to undertake, on a cost-shared basis, collaborative research and development with non-Federal entities, including State and local government, *colleges* and *universities*, and *corporations*, partnerships, sole proprietorships, and *trade associations* which are *incorporated* or established under the laws of any of the several States of the United States or the District of Columbia."

23 U.S.C. § 502(c)(1)

"To encourage innovative solutions to surface transportation problems and stimulate the deployment of new technology, the Secretary may carry out, on a cost-shared basis, collaborative research and development with-- (A) ... non-Federal entities, including State and local governments, foreign governments, *colleges* and *universities*, *corporations*, *institutions*, partnerships, sole proprietorships, and *trade associations* that are *incorporated* or established under the laws of any State ...."

22 U.S.C. § 2459(b)

"If in any judicial proceeding in any such court any such *process*, judgment, **decree**, or ORDER is ***SOUGHT***, **ISSUED**, or **ENTERED**, the United States attorney for the judicial district within which such proceeding is pending shall be entitled as of right to intervene as a party to that proceeding ...."

18 U.S.C. § 218

"In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind

any *CONTRACT*, *LOAN*, *GRANT*, *SUBSIDY*, *LICENSE*, *RIGHT*, *PERMIT*, *FRANCHISE*, *USE*, AUTHORITY, *PRIVILEGE*, *BENEFIT*, *CERTIFICATE*, *RULING*, *DECISION*, OPINION, or RATE SCHEDULE *awarded*, granted, **paid**, FURNISHED, or published, or the performance of any service or transfer or delivery of any thing to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof."

15 U.S.C. § 717d(a)

"Whenever the Commission ... shall find that any *rate*, charge, or **classification** *demanded*, *observed*, *charged*, or *collected* by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice,

or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential ...."

16 U.S.C. § 824e(a)

"Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any *rate*, charge, or classification, ***demanded***, ***observed***, *charged*, or *collected* by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential ...."

15 U.S.C. § 2065(a)

"[O]fficers or employees duly designated by the [Consumer Product Safety Commission] ... are authorized-- (1) to enter, at reasonable times, (A) any *factory*, warehouse, or establishment in which consumer products are ***manufactured*** or held, in connection with distribution in commerce ...."

Transfer of Forest Tree Nursery Facilities to States, Pub. L. No. 87-492, § 1, 76 Stat. 107 (1962)	"restoration to the trust fund of an amount equal to the residual value of any *supplies*, *materials*, *equipment*, or *improvements acquired* or constructed with trust funds and transferred to State forestry work other than the soil bank program; that such program under said Soil Bank Act has been discontinued, but the need for the trees continues to be great ..."
42 U.S.C. § 16423(c)(1)	"The term 'qualifying advanced power system technology facility' means a facility using an advanced *fuel cell*, *turbine*, or *hybrid power system* or power storage system to *generate* or store electric energy."
39 U.S.C. § 3001(k)(1)(C)	"the term 'skill contest' means a puzzle, game, competition, or other contest in which-- ... (iii) a *purchase*, *payment*, or donation is *required* or implied to be required to enter the contest ...."
7 U.S.C. § 1627b(f)(2)	"The Board shall ... (B) review any *contract*, *direct loan*, *loan guarantee*, *cooperative agreement*, *equity interest*, *investment*,

repayable grant, and *grant* to be *made* or entered into by the Center and any financial assistance provided to the Center ...."

Appendix D-2

37 Distributively Phrased Statutes in Which the First Word(s) of the First List Pair Only with the First Word(s) of the Second List and the Last Word(s) Pair Only with the Last Word(s)

49 U.S.C. § 30301(4) — "'[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."

49 U.S.C. § 31301(12) — "'[M]otor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated only on a rail line or custom harvesting farm machinery."

49 U.S.C. § 13102(16) — "The term 'motor vehicle' means a *vehicle, machine, tractor,* trailer, or semitrailer *propelled* or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle,

locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service."

16 U.S.C. § 742c(e)

"The Secretary is authorized under such terms and conditions and pursuant to regulations prescribed by him to use the funds appropriated under this section to make loans to commercial fishermen for the purpose of chartering fishing vessels pending the *construction* or repair of vessels *lost, destroyed*, or damaged by the earthquake of March 27, 1964, and subsequent tidal waves related thereto ...."

7 U.S.C. § 7470(d)

"On completion of a referendum under subsection (b) of this section, the Secretary shall suspend or terminate the order that was subject to the referendum at the end of the marketing year if-- (1) the suspension or termination of the order is favored by not less than a majority of the producers and importers voting in the referendum; and (2) the *producers* and

importers *produce* and import more than 50 percent of the total volume of kiwifruit *produced* and imported by persons voting in the referendum."

7 U.S.C. § 8401(a)(1)(B) "In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall-- (i) consider ... (III) the availability and effectiveness of *pharmacotherapies* and prophylaxis to *treat* and prevent any illness caused by the agent or toxin ..."

7 U.S.C. § 4611(b)(1) "No order issued under this chapter shall be effective unless the Secretary determines that-- (A) the order is approved by a majority of the producers, importers, and if covered by the order, handlers, voting in the referendum; and (B) the *producers*, importers, and **handlers** comprising the majority *produced*, imported, and **handled** not less than 50 percent of the quantity of the honey and honey products *produced*, imported, and **handled** during the representative period by the persons voting in the referendum."

42 U.S.C. § 300j(c)(1) "Such order shall apply to such manufacturers, producers, processors, distributors, and repackagers of such chemical or substance as the President or his delegate deems necessary and appropriate, except that such order may not apply to any *manufacturer*, producer, or **processor** of such chemical or substance who *manufactures*, produces, or **processes** (as the case may be) such chemical or substance solely for its own use."

42 U.S.C. § 262a(a)(1)(B) "In determining whether to include an agent or toxin on the list under subparagraph (A), the Secretary shall-- (i) consider- - ... (III) the availability and effectiveness of *pharmacotherapies* and immunizations to *treat* and prevent any illness resulting from infection by the agent or toxin ..."

43 U.S.C. § 902 "If at any time prior to the institution of suit by the Attorney General to cancel any *patent* or certification of lands erroneously *patented* or certified a claim or statement is presented

to the Secretary of the Interior by or on behalf of any person or persons ..."

11 U.S.C. § 1502(8) "[A]ny property subject to *attachment* or garnishment that may properly be *seized* or garnished by an action in a Federal or State court in the United States."

7 U.S.C. § 6506(a) "A program established under this chapter shall ... (4) require each certified organic farm or each certified organic handling operation to certify to the Secretary, the governing State official (if applicable), and the certifying agent on an annual basis, that such *farm* or handler has not *produced* or handled any agricultural product sold or labeled as organically produced except in accordance with this chapter ..."

33 U.S.C. § 1504(c)(2) "Each application shall include such financial, technical, and other information as the Secretary deems necessary or appropriate. Such information shall include, but need not be limited to ... (G) the location and capacity of existing and proposed

storage facilities and pipelines which will *store* or transport oil transported through the deepwater port ..."

15 U.S.C. § 636(b)(3)(A)(iii)

"[T]he term 'substantial economic injury' means an economic harm to a business concern that results in the inability of the business concern ... (III) to *market*, produce, or **provide** a product or service ordinarily *marketed*, produced, or **provided** by the business concern."

26 U.S.C. § 834(c)(6)

"In the application of section 1212 for purposes of this section, the net capital loss for the taxable year shall be the amount by which losses for such year from sales or exchanges of capital assets exceeds the sum of the gains from such sales or exchanges and whichever of the following amounts is the lesser: ... or (B) losses from the *sale* or exchange of capital assets *sold* or exchanged to obtain funds to meet abnormal insurance losses and to provide for the payment of dividends and similar distributions to policyholders."

12 U.S.C. § 1717(a)(2)(A) "which shall be in the Department of Housing and Urban Development and which shall retain the *assets* and liabilities *acquired* and incurred under sections 1720 and 1721 of this title prior to such date ..."

12 U.S.C. § 1717(a)(2)(B) "The other such separated portion shall be a body corporate to be known as Federal National Mortgage Association (hereinafter referred to as the "corporation"), which shall retain the *assets* and liabilities *acquired* and incurred under sections 1718 and 1719 ..."

7 U.S.C. § 5822(g)(1)(E) "In the case of any *tenant* or lessee who has *rented* or leased the farm (with or without a written option for annual renewal or periodic renewals) for a period of two or more of the immediately preceding years, the Secretary shall consider the refusal by a landlord, without reasonable cause other than simply for the purpose of enrollment in the program, to renew

such rental or lease as an involuntary displacement in the absence of a written consent to such nonrenewal by the tenant or lessee."

25 U.S.C. § 1633(b)

"For the purpose of implementing the provisions of this subchapter, the Secretary shall assure that the rates of pay for personnel engaged in the *construction* or renovation of facilities *constructed* or renovated in whole or in part by funds made available pursuant to this subchapter are not less than the prevailing local wage rates for similar work as determined in accordance with sections 3141-3144, 3146, and 3147 of Title 40."

10 U.S.C. § 2563(b)

"The Secretary may designate facilities referred to in subsection (a) as the facilities from which *articles* and services *manufactured* or performed by such facilities may be sold under this section."

10 U.S.C. § 2563(a)(2)(A)

"Except as provided in subparagraph (B), articles and services referred to in paragraph (1) are *articles* and services that are

	manufactured or performed by any working-capital funded industrial facility of the armed forces."
10 U.S.C. § 2563(c)(1)	"A sale of articles or services may be made under this section only if ... (C) the *articles* or services can be substantially *manufactured* or performed by the industrial facility concerned with only incidental subcontracting ...."
7 U.S.C. § 1a(18)	"The term 'eligible contract participant' means ... (v) a corporation, partnership, proprietorship, organization, trust, or other entity-- ... (III) that-- ... (bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an *asset* or liability *owned* or incurred or reasonably likely to be *owned* or incurred by the entity in the conduct of the entity's business ...."

10 U.S.C. § 2740(2)	"A case in which-- (A) the *loss* or damage occurred while the *lost* or damaged goods were in the possession of an ocean carrier that was transporting, loading, or unloading the goods under a Department of Defense contract for ocean carriage ..."
10 U.S.C. § 2740(3)(C)	"[A] claim submitted to the delivering transportation service provider or carrier is denied in whole or in part because the *loss* or damage occurred while the *lost* or damaged goods were in the custody of a prior transportation service provider or carrier or government entity."
7 U.S.C. § 950(a)(3)	"[T]he telephone bank shall cease to be an agency of the United States, but shall continue in existence in perpetuity as an instrumentality of the United States and as a banking corporation with all of the *powers* and limitations *conferred* or imposed by this subchapter except such as shall have lapsed pursuant to the provisions of this subchapter."
47 U.S.C. § 326	"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio

communications or signals transmitted by any radio station, and no *regulation* or condition shall be *promulgated* or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

26 U.S.C. § 312(f)(1)(B) "*Gain* or loss so realized shall *increase* or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing taxable income under the law applicable to the year in which such sale or disposition was made."

33 U.S.C. § 1341(a)(4) "[T]he licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the *facility* or activity shall be *operated* or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated."

30 U.S.C. § 625

"Notwithstanding any other provisions of this chapter, all mining claims and mill sites or mineral rights located under the terms of this chapter or otherwise contained on the public lands as described in section 621 of this title shall be used only for the purposes specified in section 621 of this title and no *facility* or activity shall be *erected* or conducted thereon for other purposes."

10 U.S.C. § 1074b(a)(2)

"A member of, and a designated applicant for membership in, the Senior Reserve Officers' Training Corps who incurs or aggravates an injury, illness, or disease-- (A) in the line of duty while performing duties under section 2109 of this title; (B) while *traveling directly to* or from the place at which that member or applicant *is to perform* or has performed duties pursuant to section 2109 of this title ...."

28 U.S.C. § 1453(d)

This section shall not apply to any class action that solely involves-- ... (2) a claim that relates to the internal affairs or governance of a *corporation* or other form of business enterprise and arises under or by virtue of the laws of the State in

which such *corporation* or business enterprise is *incorporated* or organized ...."

28 U.S.C. § 1332(d)(9) "Paragraph (2) shall not apply to any class action that solely involves a claim ... (B) that relates to the internal affairs or governance of a *corporation* or other form of business enterprise and that arises under or by virtue of the laws of the State in which such *corporation* or business enterprise is *incorporated* or organized ...."

42 U.S.C. § 6977(b)(1) "Subject to the provisions of paragraph (2), grants or contracts may be made to pay all or a part of the costs, as may be determined by the Administrator, of any project operated or to be operated by an eligible organization, which is designed ... (B) to train *instructors* and supervisory personnel to *train* or supervise persons in occupations involving the design, operation, and maintenance of solid waste management and resource recovery equipment and facilities."

12 U.S.C.
§ 1821(n)(1)(B)

"Upon the granting of a charter to a bridge depository institution, the bridge depository institution may-- (i) assume such deposits of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; (ii) assume such other liabilities (including liabilities associated with any trust business) of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; (iii) purchase such assets (including assets associated with any trust business) of such insured depository *institution* or institutions that *is* or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate ...."

8 U.S.C.
§ 1101(b)(1)(G)(i)(V)

"[I]n the case of a child who has not been adopted-- ... (bb) the prospective adoptive *parent* or parents *has* or have complied with any pre-adoption requirements of the child's proposed residence ...."

5 U.S.C. § 8313(b)

"The prohibition on payment of annuity or retired pay under subsection (a) of this section applies to the period after the end of the 1-year period and continues until-- ... (2) the individual returns and thereafter the *indictment* or charges *is* or are dismissed ...."

Appendix D-3

15 Other Distributively Phrased Statutes

28 U.S.C. § 636(a) — "Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law-- (1) all *powers* and duties *conferred* or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts ..."

48 U.S.C. § 1422c(b) — "All officers shall have such *powers* and *duties* as may be *conferred* or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."

25 U.S.C. § 112 — "The superintendent, agent, or subagent, together with such military officer as the President may direct, shall be present,

	and certify to the delivery of all *goods* and money required to be paid or *delivered* to the Indians."
15 U.S.C. § 69g(a)(1)	"Any fur product or fur shall be liable to be proceeded against in the district court of the United States for the district in which found, and to be seized for confiscation by process of libel for condemnation, if the Commission has reasonable cause to believe such *fur product* or fur is being *manufactured* or *held for shipment*, or *shipped*, or *held for sale or exchange* after shipment, in commerce, in violation of the provisions of this subchapter ..."
46 U.S.C. § 3302(c)(3)(C)	"In this paragraph, the term 'proprietary cargo' means cargo that ... (iii) consists of *fish* or fish products *harvested* or *processed* by the owner of the vessel or any affiliated entity or subsidiary."
42 U.S.C. § 3611(a)	"The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and

hearings under this subchapter. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the *subpoenas* or discovery were ordered or *served* in aid of a civil action in the United States district court for the district in which the investigation is taking place."

23 U.S.C. § 109(l)(2)(A) "[T]he term 'utility facility' means any privately, publicly, or cooperatively owned *line*, facility, or system for **producing**, ***transmitting***, or ***distributing*** communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public ...."

19 U.S.C. § 81r(c) "The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Board and it shall thereupon file in the court the record in the pro-

ceedings held before it under this section, as provided in section 2112 of Title 28. The *testimony* and evidence *taken* or *submitted* before the Board, duly certified and filed as a part of the record, shall be considered by the court as the evidence in the case."

7 U.S.C. § 8(b)

"The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The *testimony* and evidence *taken* or *submitted* before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order."

54 U.S.C. § 101118(a)

"The National Park Foundation and any *income* or property *received* or owned by it, and all transactions relating to that

income or property, shall be exempt from all Federal, State, and local taxation."

16 U.S.C. § 583j-2(e)(3) — "The Foundation and any *income* or property *received* or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation with respect thereto."

22 U.S.C. § 2124c(j) — "The Foundation and any *income* or property *received* or owned by it, and all transactions relating to such income or property, shall be exempt from all Federal, State, and local taxation with respect thereto."

16 U.S.C. § 916c(a) — "It shall be unlawful for any person ... (2) to ship, transport, purchase, sell, offer for sale, import, export, or have in possession any whale or *whale products* taken or *processed* in violation of the [International Convention for the Regulation of Whaling], or of any regulation of the Commission, or of this subchapter, or of any regulation of the Secretary of Commerce ...."

20 U.S.C. § 1067j(b)

"The Secretary shall establish procedures for reviewing and evaluating *grants* and contracts *made* or entered into under such programs. Procedures for reviewing grant applications, based on the peer review system, or contracts for financial assistance under this subchapter may not be subject to any review outside of officials responsible for the administration of the Minority Science and Engineering Improvement Programs."

12 U.S.C. § 1735e-1

"In the administration of housing assistance programs, the Secretary of Housing and Urban Development shall encourage the use of *materials* and products *mined* and *produced* in the United States."

Appendix E

BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, BULL. NO. 1450, at 310, 315, 313, 477 (1966–67 ed.)

Automobile salesman and new customer review sales contract.

Service advisor records customer's maintenance needs.

Automobile parts counterman dispenses part to mechanic.

Automobile mechanic uses testing equipment to tune engine.

SUPREME COURT, U.S.
FILED
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No. 15-415

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P. CALVERT
FISHER & PHILLIPS LLP
444 S. FLOWER STREET
SUITE 1590
LOS ANGELES, CA 90071
(213) 330-4450

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

April 13, 2016

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WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
(925) 297-6415
Counsel for Petitioner

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REPLY BRIEF

The Fair Labor Standards Act (FLSA) exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). As Respondents acknowledge, Congress "limited the exemption to only three enumerated types of dealership employees ('salesman, partsman, or mechanic') primarily engaged in two particular activities ('selling or servicing') on three types of machinery ('automobiles, trucks, or farm implements')." Resp.Br.13. Because service advisors are "salesm[e]n" primarily engaged in "servicing" of "automobiles," they are plainly exempt. Indeed, they are undeniably salesmen and are engaged in nothing but selling and servicing automobiles. That unambiguous interpretation is confirmed by basic rules of grammar, decades of precedent, the FLSA's underlying purposes, and a practical understanding of service advisors' roles.

Respondents nonetheless jump through hoops in an attempt to show that the statute means something different from what it literally says. First, Respondents assert that salesmen are exempt only if they are "engaged in selling ... automobiles," but not if they are "engaged in ... servicing" them. But the statute exempts "*any* salesman ... engaged in selling *or servicing* automobiles." The words "any" and "or" underscore the exemption's breadth. Respondents dust off an antiquated canon of construction and invoke a laundry list of inapposite statutes to resist this plain-language and common-sense interpretation, but none of that changes the reality that there are tens

of thousands of service advisors actively engaged in servicing automobiles who fall comfortably within the exemption's plain language.

Respondents attempt to resist that conclusion by invoking a series of ad hoc definitions of "servicing," including (among others) a "grease-under-the-nails" test, a "no tie" requirement, and a "work-in-the-back" rule. But those narrowing definitions have no grounding in the statute (or even DOL's regulatory interpretation), and all but the least plausible and most gerrymandered would impermissibly write out of the statute not only service advisors but also partsmen. At the end of the day, the only way to make sense of Congress' inclusion of partsmen is to construe "engaged in ... servicing" as encompassing both salesmen and partsmen who are engaged in the servicing process, without regard to whether they do so personally or get their hands dirty, which not coincidentally is precisely what the statutory text provides.

Finally, Respondents' and DOL's pleas for deference should be rejected. Even if the statutory language were ambiguous, DOL's unexplained return to non-acquiescence would upset decades of long-settled reliance interests through a rule that retroactively imposes massive liability on dealerships while doing nothing to advance the FLSA's purposes. The possibility that service advisors could qualify for other, more general exemptions hardly justifies a narrow and atextual interpretation of the *specific* exemption for dealership employees in §213(b)(10)(A). To the contrary, the fact that Respondents are the kind of employees *generally* exempted from the FLSA

is precisely why Congress included them in the *specific* provision addressed to three kinds of employees engaged in either of two kinds of activities involving any of three kinds of vehicles. The decision below should be reversed.

I. Service Advisors Are Unambiguously Exempt Under §213(b)(10)(A).

A. The Statute Exempts All Salesmen "Primarily Engaged in Selling *or Servicing* Automobiles."

1. Section 213(b)(10)(A) unambiguously exempts "any salesman ... primarily engaged in selling *or servicing* automobiles." To the extent that salesmen primarily engaged in servicing automobiles exist—and there are 45,000 of them—they are literally covered by the exemption. Basic rules of grammar reinforce that literal reading by dictating that each element in a disjunctive list be given meaning when it is sensible to do so. Pet.Br.24-25. The phrase "engaged in selling or servicing" is disjunctive, and both gerunds—"selling" and "servicing"—can sensibly be applied to the noun "salesman." There is nothing anomalous about either automobile salesmen or service advisors. Both exist in large numbers. Service advisors are thus exempt under a straightforward application of the statutory text. And that interpretation is further confirmed by Congress' use of the word "*any*" before "salesman," which suggests an "expansive meaning," *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

Given the clarity of the statutory text, it is unsurprising that every court to consider this issue (until the Ninth Circuit in the decision below)

concluded that service advisors were exempt. Pet.Br.27-28. Those decisions rejected DOL's interpretation as unreasonable because it is an "impermissibly restrictive construction" that is "flatly contrary to the statutory text." *Walton v. Greenbrier Ford*, 370 F.3d 446, 451-52 (4th Cir. 2004). For three decades, DOL acquiesced in those decisions and the clear result provided by the statutory text.

2. Respondents nonetheless insist that salesmen are exempt *only* if they are engaged in selling automobiles, not if they are engaged in servicing them. That is, Respondents assert that salesman goes only with selling, while partsman and mechanic go only with servicing. Resp.Br.10. In implicit recognition that the literal language of the statute covers salesmen primarily engaged in servicing, Respondents invoke the canon of construction "*reddendo singula singulis*," which translates to "referring each to each." Respondents summarize the canon as "[f]irst often goes with first, as last often goes with last." Resp.Br.24. They present a laundry list of other statutes that purportedly illustrate the canon. Resp.Br.21-24; Resp.App.D21-D35.

But the statutes that follow the *reddendo* canon have a critical thing in common, implicit in the very name of the canon, that §213(b)(10)(A) lacks: They all have the *same number* of nouns and verbs, such that *each* noun corresponds to *each* verb. Even when a statute has the same number of nouns and verbs, the *reddendo* canon is not a strong one, and context determines whether the gerunds modify multiple nouns or just one. Pet.Br.32-33 (eating/drinking dogs/cats versus barking/meowing dogs/cats). Section

213(b)(10)(A), however, contains three nouns and just two gerunds, thus defeating the precondition for the canon. Indeed, it is telling that when applying *reddendo* to §213(b)(10)(A), Respondents must invent a modified canon that highlights the poor fit. Respondents assert that "the first noun pairs with the first verb and the last *noun(s)* with the last *verb(s)*." Resp.Br.10 (emphasis added). The additional "(s)" that Respondents need to add to each reference is their own innovation and underscores the oddity of applying *reddendo* to a statute with more nouns than verbs.

To the contrary, the mismatch between nouns and verbs is a powerful indicator that the distributive principle suggested by the plain text is fully applicable. To illustrate this point, one need look no further than Respondents' 53 examples of disjunctive statutes containing different numbers of nouns and verbs. Those examples reaffirm the common-sense default grammatical rule that all nouns pair with all verbs as long as the combination describes an extant entity or is otherwise sensible. For example, 43 U.S.C. §952 permits "[a]ny person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock" to construct reservoirs. In that provision, "breeding" and "grazing" can apply to both "person" and "livestock company," while "driving" and "transporting" can apply to all three nouns. "Grazing" and "breeding" do not apply to "transportation corporation," because "transportation corporation[s]" do not commonly engage in breeding or grazing. That imperfect distribution of nouns and verbs is not the product of *reddendo* (which is inapplicable and unhelpful in matching three nouns with four verbs), but rather the

normal default rule that each noun applies to each verb *whenever it can do so sensibly*.

Respondents concede that the default grammatical rule, and not *reddendo*, applies in nearly all of the 53 statutes they identify containing two disjunctive lists of unequal numbers. Respondents highlight (quite literally) this concession in their Appendix D by using different notations (*e.g.*, underlining, bolding) to illustrate when particular nouns pair with particular verbs (*e.g.*, underlining both the noun and verb when they pair). Thus, the telltale sign in Appendix D that a statute conforms to the default grammatical rule, and not *reddendo*, is when a word is modified in two (or more) ways (*e.g.*, underlined *and* italicized). In those instances, nouns pair with more than one verb (or vice versa), so that each sensible noun-verb combination has meaning. *See* Resp.App.D2-D20.

Respondents attempt to demonstrate the applicability of *reddendo* to two disjunctive lists of unequal numbers by offering the contrived sentence: "When my cats, dogs, or seals are meowing or barking, I feed them." Resp.Br.25. There are, of course, no barking cats or meowing dogs or seals, so *reddendo* is not needed to exclude them. If anything, this sentence merely illustrates that disjunctive nouns pair with disjunctive verbs *when sensible*. In Respondents' contrived "cat-dog-seal" sentence, the problem is not that the nouns do not distribute to every verb, but that some noun-verb combinations are not sensible or constitute a null set. If the word "listless" were substituted for "barking," there is little question that a listless cat would be fed. Indeed, even in

Respondents' stylized sentence, it seems likely that a newly-discovered meowing seal would not go hungry.

3. Respondents and DOL rely heavily on *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803), as an example of this Court's invocation of *reddendo*, *see* Resp.Br.21-22; U.S.Br.18-19, but that reliance is badly misplaced.

It is no accident that Respondents need to reach back so far to find an example, as the canon has largely fallen into disuse. The canon last appeared in any Supreme Court decision in a 1918 *dissent*, *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918) (McKenna, J., dissenting), was last mentioned in a majority opinion in 1896, *Atlantic & Pacific R.R. v. Laird*, 164 U.S. 393, 400 (1896), and did not feature in the decisions below.

Simms is readily distinguishable. The statute there provided that "penalties ... accruing *under the laws of ... Maryland and Virginia*, ... shall be recovered..., *by indictment or information*..., or *by action of debt*...." *Simms*, 5 U.S. at 254 (emphasis added). In that case, the United States sought recovery under Virginia law by indictment. The problem was that Virginia law did not authorize recovery by indictment, but instead by "action of debt." *Id.* at 256. Thus, under Virginia law, recovery by indictment was the functional equivalent of a barking cat. There was no such thing. This Court understandably concluded that Congress did not create a new remedy under Virginia law, especially in light of a related statute that required the United States to maintain Virginia law. *Id.* at 257-59.

Simms illustrates what happens when a particular combination of words produces a null set. In that situation, the basic rule of grammar does not require the *creation* of a new combination where none previously existed. But where combinations are sensible, the basic grammatical rule and literal reading still prevail. If Virginia law *had* permitted recovery by indictment, or Maryland had permitted recovery by indictment, information, and action for debt, all the extant actions could proceed.

The same principle holds for §213(b)(10)(A). Respondents and DOL suggest that the phrase "engaged in ... *servicing* automobiles" does not apply to *salesmen* because there are no *mechanics* who are "primarily engaged in *selling*" automobiles. Resp.Br.26-27; U.S.Br.20. But that is a non sequitur. Mechanics primarily engaged in selling automobiles are not covered by the exemption because they do not exist, not because they are excluded by some grammatical principle. The problem for Respondents is that while there are no mechanics primarily engaged in selling automobiles, there *are* salesmen primarily engaged in servicing automobiles—service advisors. Indeed, there are 45,000 more salesmen primarily engaged in servicing automobiles than there are mechanics primarily engaged in selling automobiles. The non-existence of the latter is no reason to deny exempt status to tens of thousands of flesh-and-blood examples of the former.

4. Respondents also invoke multiple grammar guides, but none supports their strained interpretation. Resp.Br.20-23, 26. For example, Scalia and Garner *disapprove* of *reddendo* as the

byproduct of an earlier era of inartful drafting. *See* Antonin Scalia & Bryan Garner, *Reading Law* 215-16 (2012). Respondents suggest that, because grammar guides disapprove of unnecessary use of the word "respectively," *reddendo* must generally apply because the word "respectively" would otherwise be needed to convey a one-to-one pairing. Resp.Br.26. But Respondents fail to mention *why* grammarians disapprove of "respectively." Using "respectively" is disfavored because there are straightforward ways to achieve the same meaning—specifically, by attaching each gerund to only the noun it modifies. *See* William Strunk & E.B. White, *Elements of Style* 51 (2d ed. 1972). More tellingly, Fowler notes that using "respectively" is "unintelligible" in sentences with *unequal* numbers of nouns and direct objects, underscoring the absurdity of applying *reddendo* (Respondents' suggested substitute for "respectively") in such contexts. H.W Fowler, *Dictionary of Modern English Usage* 522 (2d ed. 1965).

The lesson from these grammar guides is that Congress could have easily written §213(b)(10)(A) to exempt "any salesman primarily engaged in selling, or any partsman or mechanic primarily engaged in servicing, automobiles." But Congress did not express itself that way because it plainly intended for the gerunds "selling" and "servicing" to distribute to each noun that could be sensibly linked to those gerunds.

B. Service Advisors Are Unambiguously "Engaged in ... Servicing Automobiles."

It is undisputed that Respondents are salesmen.[1] They are also "engaged in ... servicing automobiles" because they are the salesmen dedicated to the servicing portion of the dealership's business. Pet.Br.23-24. Service advisors diagnose customers' service needs, provide information about optional services, and ensure that customers are satisfied with the services provided. As Respondents' complaint makes clear, service advisors are integral to a dealership's servicing of vehicles. J.A.40-41. In short, service advisors are "primarily engaged in ... servicing automobiles" by selling the servicing of automobiles. Service advisors are certainly not primarily engaged in any activity *other than* selling or servicing automobiles, nor are they primarily engaged in selling or servicing anything other than automobiles.

1. Respondents and DOL nonetheless argue that there is ambiguity as to whether service advisors are engaged in servicing automobiles, but those arguments fail.

First, Respondents attempt to circumvent the statutory language "primarily engaged in ... servicing automobiles" by pretending it does not exist. Respondents repeatedly ignore the phrase "primarily engaged in" and casually suggest that the statute exempts only salespeople "*who sell* automobiles" or partsmen and mechanics "*who service* automobiles."

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[1] The AFL-CIO weakly suggests that service advisors may not be salesmen, *see* AFL-CIO.Br.4, 15-16, but Respondents' complaint states otherwise, J.A.40-41.

Resp.Br.8-10, 15-16, 27 DOL does the same in its regulation, exempting only "salesmen *who sell* vehicles and partsmen and mechanics *who service* vehicles." 76 Fed. Reg. 18,832, 18,838 (2011) (emphasis added); *accord* U.S.Br.24.

But Congress did not enact those formulations. Instead, Congress exempted "any salesman ... *primarily engaged in* selling or servicing automobiles." The phrase "engaged in"—as well as the expansive words "any" and "or"—clearly indicates an intent to broaden the category of exempt employees beyond just those who are under the hood performing service on automobiles. *Compare* 29 U.S.C. §203(j) (defining "[p]roduced" as "produced, manufactured, mined, handled, or in any other manner worked on"), *with id.* (defining "*engaged in* the production of goods" more broadly, as "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any closely related process or occupation directly essential to the production thereof*" (emphasis added)).

Congress could have easily enacted the language that Respondents and DOL wish had been enacted. Indeed, as Respondents note, Congress has routinely used the terms "servicing" or "perform service" (as opposed to "engaged in servicing"). For example, 42 U.S.C. §7671h(c) requires any "person repairing or servicing motor vehicles" to obtain a certification. *See also* 2 U.S.C. §2025(b). None of those other statutes uses the broader phrase "engaged in ... servicing," nor do they appear to reach partsmen. These differences in statutory language make clear that Congress knows how to use the word "servicing" and elected a broader

meaning by using "engaged in servicing" in §213(b)(10)(A).

For similar reasons, Respondents' reliance on a Google Books search of the phrase "salesmen servicing" is utterly irrelevant. Resp.Br.20. Even if Google Books were a sound interpretive guide, this particular search is unavailing. No one suggests that service advisors primarily do something other than sell. Indeed, it is because they sell that they are among the "any salesman" covered by §213(b)(10)(A). And it is because they sell the servicing of automobiles that they are salesmen *primarily engaged in* servicing automobiles. Certainly, nothing in Google Books or any other source suggests that there is anything anomalous about salespeople selling services rather than things (like automobiles).[2] And, as with so many aspects of Respondents' argument, their Google-search argument fails to account for the statute's undoubted coverage of partsmen. The Google Books database contains exactly one (irrelevant) hit for "partsman servicing," but that hardly suggests that partsmen are non-exempt.

2. The Ninth Circuit attempted to inject ambiguity into the text of §213(b)(10)(A) by offering a construction in which "engaged in servicing" applies only to employees who "personally" service automobiles. Pet.App.12-13. Respondents now

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[2] Our Google Books search yielded 29,500 results for "selling services," and a search for "salesman selling services dealerships" did not turn up a null set, but, *inter alia*, the explanation that "[t]he service department is tasked with selling the labor time of all the mechanics in the department." Steven Shaw, *Cheating the Dealer* 16 (2011).

distance themselves from that holding, asserting that DOL's regulation never used the word "personally" and that the Ninth Circuit used that term only "in passing." Resp.Br.18. Although Respondents (correctly) decline to defend a "personally service" requirement, they nonetheless offer a number of other interpretations of "engaged in ... servicing" that do the same thing *sub silentio* and are every bit as narrow and atextual as the Ninth Circuit's approach.

For example, Respondents contend that "Congress used the term 'servicing' ... to refer to the activity of employees who maintain or repair automobiles." *Id.* But that does not advance the ball. Even if servicing involves maintaining and repairing, the question remains whether an employee must maintain or repair the vehicles "personally" or "directly." And it is clear that Congress did not intend such a narrow requirement, both because it omitted such adverbs and included partsmen, who do not themselves "perform[] maintenance or repairs" on automobiles. *Id.* For similar reasons, Respondents badly miss the mark when they assert that "[e]ven if a salesman sells automobile services performed by a mechanic, the salesman is not the one who is 'servicing' the automobiles." Resp.Br.29. Once again, the same could be said for partsmen: "Even if a [partsman supplies parts for] automobile services performed by a mechanic, the [partsman] is not the one who is 'servicing' the automobiles." In reality, Congress did not include any requirement that salesmen or partsmen themselves be the ones who do the servicing.

It is enough that they are "primarily engaged in ... servicing automobiles." Pet.Br.29-31.[3]

3. Perhaps recognizing that the Ninth Circuit's legal theory would write partsmen out of the statute, Respondents attempt to redefine "servicing" in a convoluted effort to capture partsmen but exclude service advisors. Resp.Br.32-40. Respondents resort to a scattershot listing of potential characteristics that *might* distinguish *some* partsmen from service advisors. For example, they argue that some partsmen "*may*" have "grease under their fingernails," get their "hands dirty," wear no tie to work, or "work in the back" of a dealership. Resp.Br.11, 34-35.

There are several obvious problems with Respondents' attempt to redefine "servicing" in this manner. First, not one of Respondents' proffered tests has any basis in the statute. Nothing in §213(b)(10)(A)'s text suggests that Congress even remotely cared about the amount of grease on a partsman or salesman's fingers, or the fact that a service advisor, but not a partsman, may wear a tie. Nor is there any indication that Congress intended to exempt employees based on whether they "work in the back" or as a mechanic's "right-hand" person. Congress demonstrated no intent whatsoever to divvy

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[3] DOL similarly asserts that service advisors are not exempt because "they sell the servicing performed by others." U.S.Br.11. But emphasizing that the servicing is performed by others is just another way of saying that service advisors do not personally do the servicing. The same is true of partsmen: "they [requisition, stock, and dispense parts for] the servicing performed by others." *Id.*; 29 C.F.R. §779.372(c)(2).

up "servicing" based on such extra-textual considerations.

Second, Respondents' effort is flatly contrary to DOL's own regulations. Those regulations define "partsman" expansively as an employee "primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2). The government selectively paraphrases this regulation as encompassing an employee who "involve[s] himself in repairing or providing maintenance for automobiles by working with a mechanic and 'dispensing parts.'" U.S.Br.22-23. But a partsman who only "requisition[s]" and "stock[s]" parts is equally exempt and materially indistinguishable from a service advisor: both are unquestionably *engaged in* the servicing of automobiles even though neither is under the hood performing the service.

Indeed, even the government concedes that a partsman is engaged in servicing even if he "does not personally install the parts" because partsmen perform a "key task[] in repairing the vehicle." U.S.Br.23. But, once again, the same can be said of service advisors, who also perform "key tasks" in servicing the vehicle.[4] Borrowing from the government's apt explanation, "[a] mechanic, of course, might be able to [ascertain customer needs and get customer approval] to complete a repair without the real-time assistance of a [service advisor] by his side. But that merely reinforces the conclusion that a

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[4] Respondents feign ignorance about what it means for a task to be "integral" to the servicing process, Resp.Br.1, 19, but DOL apparently has no such difficulty in light of its nearly identical reference to "key tasks" in the service process.

[service advisor] is involved in repairing or providing maintenance because he performs key tasks in repairing the vehicle. Dividing those tasks between two individuals reflects that both the mechanic and the [service advisor] are logically understood as involved in repairing ('servicing') the vehicle." *Id.*

* * *

In sum, neither Respondents nor the Ninth Circuit nor DOL has been able to articulate any coherent interpretation of §213(b)(10)(A) under which partsmen are engaged in servicing automobiles but service advisors are not. That failure is hardly surprising. Congress drafted the exemption broadly to encompass *any* salesman, partsman, or mechanic primarily engaged in servicing automobiles, and that expansive statutory text plainly encompasses *both* service advisors and partsmen. No canon of construction permits interpreting the concept of "servicing" broadly for partsmen and narrowly for salesmen. *See FCC v. AT&T*, 562 U.S. 397, 408 (2011).

C. The Legislative History Sheds No Light on the Exemption's Scope.

The Ninth Circuit concluded that "[n]on-textual indicators of congressional intent, such as legislative history, are inconclusive," and for good reason. Pet.App.15. While Respondents and the government invoke floor statements, unrelated exemptions, statements by non-legislators, and even post-enactment legislative "history," they can point to no legislative history directly addressing whether *service advisors* are within or without the exemption. Respondents' and the government's efforts to use "ambiguous legislative history to muddy clear

statutory language," *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011), are the kinds of arguments that give legislative history a bad name.

For example, Respondents suggest that because Congress "focused" on farm-implement partsmen when passing the exemption, it intended to exempt partsmen primarily because they travel offsite and work irregular hours. Resp.Br.36-38. But, while an earlier version of the bill exempted only farm-implement partsmen, the statute Congress eventually enacted exempted *all* partsmen. And Respondents cannot plausibly contend that the exemption only reaches salesmen, partsmen, and mechanics who travel offsite or work irregular hours.

Respondents then draw exactly the wrong inference from the earlier version of the 1966 amendment. As Respondents note, that earlier version separately exempted "partsmen primarily engaged in *selling or servicing* farm implements." H.R. 13,712, 89th Cong. §209(b) (ordered to be printed by Senate, Aug. 26, 1966) (emphasis added); Resp.Br.36. Congress later rolled that exemption into §213(b)(10)(A), which covered automobiles, trailers, trucks, and aircraft, as well as farm implements. The fact that Congress had initially exempted partsmen "engaged in *selling or servicing* farm implements" confirms that Congress intended the disjunctive phrase "selling or servicing" to be interpreted broadly and for the gerunds "selling" and "servicing" to apply to *each* noun, even to the relatively rare partsman engaged in selling, and not servicing, farm implements. There are far more service advisors (*i.e.*, salesmen engaged in selling services) than

partsmen engaged in selling farm implements and no more reason to exclude the former than the latter, who were undeniably covered by §213(b)(10)(A)'s predecessor.

Respondents next argue that Congress intended to exempt only car salesmen, and not other types of salesmen, because some Members of Congress discussed only car salesmen in floor statements. Resp.Br.3, 16; U.S.Br.25-26. But this Court is wary enough about drawing inferences from the *absence* of statutory text. *See, e.g., Burns v. United States*, 501 U.S. 129, 136 (1991). Drawing inferences from gaps in the legislative history when the text is broad and clear plainly takes matters too far. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Id.*

Not to be outdone, DOL offers even less reliable evidence of *congressional* intent—statements from *non-members of Congress*. U.S.Br.25. Those statements (from a witness at a subcommittee hearing) shed no light on what Congress actually intended or enacted. Plumbing the depths of witness statements when the Members (and even their staff) are silent is truly "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005).

Respondents and DOL complete the exercise by invoking *post-enactment* legislative history to draw inferences about the enacting Congress' intent. This so-called history, better characterized as "legislative future," *United States v. SCS Bus. Inst.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (Silberman, J.), is a

remarkably poor indicator of congressional intent *at the time Congress acted*. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*, 562 U.S. 223, 242 (2011).

The cited post-enactment "history" confirms why such materials are devoid of interpretive value. Respondents assert that the *1974* FLSA amendments—which did not amend any of the relevant language in §213(b)(10)(A)—show that, *in 1966*, Congress intended to exempt salesmen engaged in selling automobiles, but not salesmen engaged in servicing automobiles. Resp.Br.30-31. The 1974 amendment narrowed the exemption for trailer, boat, and aircraft dealerships (not automobile dealerships) to "any salesman primarily engaged in selling" those vehicles. Pub. L. No. 93-259, §14, 88 Stat. 55, 65 (1974).

Respondents and the government speculate that by removing the words "partsman" and "mechanic" and the phrase "or servicing" for trailer, boat, and aircraft dealerships in 1974, Congress intended to apply only "selling" to "salesman" in the *1966* exemption for *car dealerships*. That theory "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). Even if the 1974 amendment were somehow relevant, it is equally consistent with a congressional intent to make non-exempt *any employee* engaged in servicing at trailer, boat, and aircraft dealerships—whether they were partsmen, mechanics, or service advisors. Indeed, there would be no better way for Congress to have made all those primarily engaged in servicing, including service

advisors, non-exempt than by making those changes. That Congress made no comparable changes to §213(b)(10)(A) strongly indicates that all three remain exempt.

D. FLSA Exemptions Should Not Be Interpreted Narrowly.

Respondents also double down on "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135 (1995)—the anti-employer canon that the FLSA's exemptions should be construed "narrowly." Resp.Br.40-43.[5]

Respondents defend the Ninth Circuit's reliance on that canon based on Congress' expectations when it enacted the exemption. But the far more reasonable way to assess congressional expectations is to look at the text that Congress enacted. Indeed, the whole purpose of §213(b)(10)(A) was to ensure that the FLSA *did not* apply to certain employees whose job duties and compensation structure made them a poor fit with the FLSA's inflexible regime of mandatory overtime compensation. It thus makes no sense to construe that exemption (or any other FLSA exemption) narrowly. Like any other statute, an FLSA exemption should be construed neither narrowly nor broadly, but fairly and correctly. Pet.Br.34-35; Chamber.Br.5-15.

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[5] Strangely, the government denies that the Ninth Circuit relied on the anti-employer canon, U.S.Br.26-29, even though the court invoked the canon repeatedly, Pet.App.6, 8, 11.

II. DOL's Interpretation Is Unreasonable Even If The Exemption Is Ambiguous.

A. DOL's Regulatory Interpretation and Respondents' Newly Offered Definitions of "Servicing" Are Entitled to No Deference.

DOL's interpretive regulations deserve no deference under *Chevron* because they are neither "reasonable," *Chevron v. NRDC*, 467 U.S. 837, 843-44 (1984), nor deserving of deference in light of DOL's unjustified flip-flop-flip. DOL had it right when it acquiesced in the uniform views of the courts interpreting §213(b)(10)(A). Its unexplained un-acquiescence, involving less reasoning than its initially-rejected position, cannot carry the day. Moreover, all of the arguments for why the exemption's text is unambiguous apply with equal, if not greater, force in explaining why DOL's interpretation is objectively unreasonable.

DOL provides no satisfactory explanation for its artificial narrowing of the textual exemption. Respondents and DOL concede that salesmen are people who sell. Yet they attempt to unduly restrict the exemption to cover only salesmen who sell *cars*, not those who sell the servicing of cars. Because the statute covers "any salesman," the only question is whether salespeople who sell services are "engaged in servicing," even though they do not directly perform the service. The answer to that question is found in Congress' inclusion of partsmen, who are engaged in servicing and are plainly exempt, even though they do not directly perform service on automobiles. Pet.Br.28-31; *supra* pp.12-16. DOL's unreasonable

narrowing of the definition of "salesman" warrants no deference.

This Court likewise cannot defer to the many novel arguments that Respondents raise for the first time, such as their gerrymandered definitions of "servicing." Those arguments are unpersuasive on their own terms and cannot support a deference argument because they run afoul of "the foundational principle of administrative law" that courts may not consider arguments not embraced by the agency in its rulemaking. *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). DOL's regulation must rise or fall based on the agency's own reasoning, not arguments first advanced by a private party in an appellate court.[6]

B. Treating Service Advisors as Exempt Is Consistent With the FLSA's Structure and Broader Purposes.

Treating service advisors as non-exempt also makes little sense in the context of the broader statutory scheme. The FLSA contains many provisions that exclude salespeople and commissioned employees from the mandatory-overtime rules. *See* 29 U.S.C. §§207(*i*), 213(a)(1). Those provisions reflect the basic reality that salespeople such as service advisors are often far removed from the FLSA's original purposes and ill-suited to the FLSA's regulatory regime.

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[6] Respondents also advance the indefensible proposition that the statute unambiguously renders service advisors *non-exempt*. Resp.Br.2, 13. That position was a bridge too far even for the Ninth Circuit and DOL, neither of which has ever suggested that service advisors are *unambiguously* non-exempt. Pet.App.6; U.S.Br.14.

Respondents argue that Petitioner is seeking to create an "implied exemption" in §213(b)(10)(A) based on the FLSA's other express exemptions. Resp.Br.53-55; *accord* Professors.Br.4-7, 10-13. But that attacks a strawman. Petitioner cited the FLSA's other exemptions for salespeople and commissioned employees because they demonstrate that the exemption for dealership salesmen in §213(b)(10)(A) is motivated by Congress' understanding that salespeople are "more concerned with their total work product than with the hours performed." *Brennan v. Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973). That is certainly true of Respondents, who are paid commissions.[7] Forcing dealerships to pay overtime to service advisors under the one-size-fits-all FLSA regime is a misguided attempt to fit a square peg into a round hole because salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2173 (2012).

Finding service advisors non-exempt would also create unwarranted divisions among dealerships' core employees. Respondents and their *amici* contend that there are no concerns about creating divisions within a dealership's salesforce because a number of other salespeople at dealerships are not exempt under

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[7] Respondents suggest that Petitioner seeks to exempt service advisors because they are paid commissions. Resp.Br.52-53; *accord* Professors.Br.10-13. Not so. Service advisors are compensated in various ways, Pet.Br.13 n.4, and eligibility for the §213(b)(10)(A) exemption does not turn on the method of compensation.

§213(b)(10)(A). Resp.Br.15-16; AFL-CIO.Br.18-32.[8] But those salesmen fall outside the exemption because they are not "engaged in selling or servicing automobiles." Congress has decided to exempt all core employees (salesmen, partsmen, and mechanics) engaged in two core dealership functions (selling and servicing). Denying an exemption under §213(b)(10)(A) for a subset of those core dealership employees engaged in servicing would inevitably be disruptive and divisive and contravene Congress' clearly expressed intent. Moreover, to the extent service advisors share characteristics of both their fellow exempt salespeople and their fellow exempt servicing employees, it makes no sense to make service advisors alone non-exempt. Respondents are primarily engaged in selling and servicing and are not primarily engaged in anything else. The notion that they somehow fall between the cracks created by DOL is mystifying, and has mystified every court to consider the question, save the Ninth Circuit below.

Respondents' concerns about re-enacting the 1961 blanket exemption for all dealership employees are pure hyperbole. Resp.Br.9. The blanket exemption covered *everyone* employed by a dealership, including typically non-exempt employees (*e.g.*, porters, janitors). Pub. L. No. 87-30, §9, 75 Stat. 65, 73 (1961). Those employees—who are not salesmen, partsmen,

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[8] The AFL-CIO focuses exclusively on decisions of the Labor Board rather than the FLSA. AFL-CIO.Br.2. That brief's laundry list of non-exempt employees in servicing departments (at 18-32) is entirely irrelevant to service advisors' exempt status because none of the non-exempt employees is a "salesman, partsman, or mechanic."

or mechanics—will remain non-exempt no matter how the Court decides this case.

C. DOL Has Failed to Adequately Justify Its Adoption of an Interpretation That Upsets Long-Settled Expectations.

The Ninth Circuit's decision upends an area of law that had been settled for over 30 years. Affirming the decision below would have significant negative consequences for the nation's 18,000 car dealerships employing 45,000 service advisors. NADA.Br.11-14. Those dealerships and their service advisors have operated under mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt and decades of DOL acquiescence in those decisions. Pet.Br.40-45. Those compensation plans were in full effect when DOL changed its long-standing interpretive position in 2011.

If allowed to stand, the Ninth Circuit's decision would require a wholesale and wholly unwarranted restructuring of how those employees are compensated, with no ability for service advisors who prefer the *status quo ante* to opt out. This Court should reject plaintiffs' attempts to impose significant liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See Christopher*, 132 S. Ct. 2156.

Finally, even if some service advisors might potentially be covered by different, less specific, and more burdensome FLSA provisions, *see* Resp.Br.53-55; U.S.Br.34-35, that is no reason to adopt an unduly narrow interpretation of §213(b)(10)(A). Indeed, to the extent service advisors share characteristics that

make employees exempt generally, that is just one more reason that it is nonsensical to deny them the specific exemption Congress gave to all salesmen, partsmen, and mechanics primarily engaged in the servicing of automobiles.

CONCLUSION

Service advisors are unambiguously exempt because they are engaged in servicing automobiles by *selling the servicing*. That is the only interpretation that gives meaning to the statute's expansive language, disjunctive phrasing, and exemption of partsmen, who are engaged in servicing even though they do not perform service under the hood. This Court should make clear that the statute means what it says and reject Respondents' and DOL's misguided efforts to upend long-standing compensation practices. The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
(213) 330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd.
#281
Lafayette, CA 94549
(925) 297-6415

Counsel for Petitioner

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

M. PATRICIA SMITH
Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
PAUL L. FRIEDEN
Counsel for Appellate Litigation
MELISSA A. MURPHY
LAURA M. MOSKOWITZ
Senior Attorneys
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether "service advisors" at automobile dealerships are exempt under 29 U.S.C. 213(b)(10)(A) from the overtime-pay requirements of the Fair Labor Standards Act.

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INTEREST OF THE UNITED STATES

This case presents the question whether service advisors at automobile dealerships are exempt under 29 U.S.C. 213(b)(10) from the overtime-pay requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* The United States has a significant interest in the resolution of that question because the Department of Labor (Department) is responsible for administering and enforcing the FLSA's minimum-wage and overtime-pay provisions. 29 U.S.C. 204, 211(a), 216(c), 217.

STATEMENT

1. Congress enacted the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees. See *Brooklyn Sav. Bank* v. *O'Neil*, 324

U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage), 207 (overtime pay). The FLSA, however, exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" if the salesman, partsman, or mechanic is employed by a retail dealership primarily engaged in selling such vehicles or implements. 29 U.S.C. 213(b)(10)(A). The question presented is whether such "service advisors" fall outside Section 213(b)(10)(A)'s overtime exemption because they are not salesmen primarily engaged in "selling * * * automobiles" (as the government and respondents contend), or whether "service advisors" qualify for exemption as "salesmen" primarily engaged in "servicing automobiles" (as petitioner contends, see Pet. Br. 18, 23).

a. Section 213(b)(10) took its current form in 1974 after evolving as part of a series of amendments to the FLSA. In 1961, Congress enacted an exemption from the Act's minimum-wage and overtime requirements for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 73 (enacting 29 U.S.C. 213(a)(19) (1964) (repealed 1966)). After just four years, however, Congress considered legislation to repeal that exemption. See *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. Pt. 1, at 5 (1965) (*1965 House Hearing*) (reproducing H.R. 8259 § 305).

The National Automobile Dealers Association (NADA) opposed repealing the exemption. *1965 House Hearing* 366, 369. In addition, NADA requested that Congress clarify the state of the then-existing law by enacting an overtime exemption for a particular subset of its members' employees, namely, any "automobile salesman or mechanic [employed] by an establishment primarily engaged in the business of selling automobiles or trucks." *Id.* at 369. With respect to salesmen, NADA's representative testified that the "automobile salesmen" who would be exempt were "extremely well-paid employees" who did not need overtime protection, and that it would be "practically impossible" to "keep accurate records of the time [a salesman] spends working" because "[a] salesman * * * is actually selling, or trying to sell, every place he goes where he is in contact with the public" and therefore "spends a substantial number of hours performing his duties away from the dealer's place of business." *Id.* at 368-369; see *id.* at 372.

In 1966, Congress repealed the FLSA's automobile dealership exemption. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209(a), 80 Stat. 836 (repealing 29 U.S.C. 213(a)(19)). Congress, however, accommodated NADA's request for an overtime exemption by enacting an exemption for:

> (10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.

Id. § 209(b), 80 Stat. 836 (29 U.S.C. 213(b)(10) (1970)).

In 1970, the Administrator of the Department's Wage and Hour Division (Administrator) issued an Interpretive Bulletin addressing the 1966 amendments. 35 Fed. Reg. 5856 (Apr. 9, 1970). As pertinent here, the Administrator addressed the scope of Section 213(b)(10) by construing the terms "salesman," "partsman," and "mechanic." 29 C.F.R. 779.372(c) (1971). A "salesman," the bulletin explained, "is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicle or farm implements" sold by his employer. 29 C.F.R. 779.372(c)(1) (1971). The bulletin also stated that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described [in the bulletin] are not exempt under section [2]13(b)(10)." 29 C.F.R. 779.372(c)(4) (1971).

In 1974, following the Department's Interpretive Bulletin, Congress revisited Section 213(b)(10) both (1) to repeal "[t]he overtime exemption for partsmen and mechanics" in establishments "selling aircraft and trailers," and (2) to add an exemption for "salesmen" in establishments "selling boats." H.R. Rep. No. 913, 93d Cong., 2d Sess. 47 (1974); see *id.* at 4, 13.

Rather than reenacting a single provision addressing all exempt "salesmen" at automobile, truck, farm-implement, trailer, boat, or aircraft dealerships, however, Congress enacted two parallel provisions within Section 213(b)(10). See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 65. One exempts any "salesman, partsman, or mechanic" primarily engaged in "selling or servicing"

automobiles, trucks, or farm implements. 29 U.S.C. 213(b)(10)(A). The other exempts "any salesman primarily engaged in selling trailers, boats, or aircraft." 29 U.S.C. 213(b)(10)(B). This latter provision omits any reference to "partsmen or mechanics" or to "servicing" such vehicles. The overtime exemption in Section 213(b)(10) thus now exempts:

> (10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or
>
> (B) any salesman primarily engaged in selling trailers, boats, or aircraft, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.

29 U.S.C. 213(b)(10).

b. Between 1978 and 2011, the Department did not enforce Section 213(b)(10) consistent with its 1970 Interpretive Bulletin concerning service advisors. By 1978, two courts of appeals—one in a precedential opinion and the other in a nonprecedential disposition—disagreed with the Department, holding that Section 213(b)(10) exempts "service advisors" from the FLSA's overtime-pay requirements. *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1098 & n.3 (5th Cir. 1973) (explaining that Section 213(b)(10) "is not entirely clear" and that "the issue here is a close one"); *Dunlop* v. *North Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Tbl.) (unpublished, one-word disposition).

In 1978, the Administrator issued an opinion letter stating that Section 213(b)(10)(A)'s exemption could extend to a "service advisor" because a service advisor is "engaged in selling activities" if his "service sales [are not sales] for warranty work" performed under a warranty previously purchased by the customer. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter WH-467 (July 28, 1978), available at 1978 WL 51403. The Administrator noted that his position was "a change from the position set forth in section 779.372(c)(4) of our [1970] Interpretive Bulletin." *Ibid.*

In 1987, the Wage and Hour Division revised its Field Operations Handbook (FOH), which provides internal enforcement policy for the Department's FLSA investigations, to address "service advisors" and similarly titled employees. The revision stated that because the "Fifth and Sixth Circuits" and "two district courts" had concluded that service advisors are exempt under Section 213(b)(10), the Wage and Hour Division "will no longer deny the [overtime] exemption for such employees." Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* § 24L04(k) (Oct. 20, 1987). "This policy," the revision stated, "represents a change from the position in [Interpretive Bulletin] 779.372(c)(4), which will be revised as soon as is practicable." *Ibid.*

In 2004, the Fourth Circuit issued the second precedential decision by a court of appeals holding service advisors exempt under Section 213(b)(10)(A). See *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446 (2004).

c. In 2008, the Department issued a notice of proposed rulemaking proposing, *inter alia*, to revise 29 C.F.R. 779.372 to state that "service advisors" are

exempt under Section 213(b)(10)(A). See 73 Fed. Reg. 43,654, 43,658-43,659, 43,671 (July 28, 2008).

In 2011, following public comment on the proposal, the Department issued a final rule readopting its 1970 understanding of Section 213(b)(10) and repromulgating its regulatory interpretation of "salesman," "partsman," and "mechanic" with minor revisions. 76 Fed. Reg. 18,832, 18,837-18,838, 18,858-18,859 (Apr. 5, 2011). The Department agreed with the conclusion that Section 213(b)(10)(A) "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle." *Id.* at 18,838. The Department accordingly determined that the provision exempts only "salesmen who sell vehicles and partsmen and mechanics who service vehicles" and "does not" exempt "service managers, service writers, service advisors, or service salesmen" who sell servicing for such vehicles. *Ibid.*

The 2011 regulation provides that, *inter alia*, for purposes of both Section 213(b)(10)(A) and (B), "a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, [other vehicles], or farm implements" that the establishment employing him is primarily engaged in selling. 29 C.F.R. 779.372(c)(1). The 2011 regulation omits former Section 779.372(c)(4), which had separately addressed the non-exempt status of "service advisors."

2. Petitioner owns a Mercedes Benz dealership for which respondents currently or previously worked as "Service Advisors." J.A. 39. Petitioner employed service advisors, including respondents, in its "service center" to "meet and greet Mercedez Benz owners as

they enter the service area"; evaluate each owner's "service and/or repair needs"; "solicit and suggest[]"service work for the vehicle; and "write up an estimate for the repairs and services" for the owner, at which point the vehicle is "taken to the mechanics at [the dealership] for repair and maintenance." J.A. 39-40. Service advisors may call the owner while the vehicle is with a mechanic to "solicit and suggest" additional service work. J.A. 40.

Petitioner requires service advisors to work from 7 a.m. to 6 p.m. at least five days a week, during which time the service advisors must "remain at their service posts" and be "on call" during any "meal or rest break[s]." J.A. 39. Petitioner pays service advisors on a pure commission basis, calculated according to the amount of service work they sell. J.A. 40-41.

3. In September 2012, respondents filed this action alleging, as relevant here, that petitioner failed to pay them overtime wages required by the FLSA. J.A. 42-43, 48, 55. The district court dismissed respondents' FLSA claims and declined to exercise jurisdiction over their state-law claims. Pet. App. 22-32. The court concluded that Section 213(b)(10)(A) is ambiguous but declined to accord *Chevron* deference to the Department's 2011 regulations. *Id.* at 25-29. The court held that service advisors are engaged in the "'selling and servicing' of automobiles" like "salesmen and mechanics" and that the Department's contrary conclusion was unreasonable. *Id.* at 29.

4. The court of appeals reversed in relevant part and remanded. Pet. App. 1-19.

First, like the district court, the court of appeals concluded that Section 213(b)(10)(A) is "ambiguous" because it provides "no clear answer to whether Con-

gress intended to include service advisors within the exemption." Pet. App. 6-8. The court explained that it would be "plausible to read the term 'salesman' broadly and to connect the term to 'servicing automobiles,'" but that it is "at least as plausible" to read "salesman" as linked only to "sell[ing]" automobiles, which service advisors do not do. *Id.* at 7. The court stated that Congress may often intend to link "each subject * * * with each verb" when it "uses a list of disjunctive subjects (here, 'salesman, partsman, or mechanic') followed by a list of disjunctive verbs (here, 'selling or servicing')," but that the analysis of that question ultimately "depends on context." *Id.* at 14. "[M]ost English speakers," the court explained, would understand that the statement that I know my pets need to be let out "'if my dogs or cats are barking or meowing'" is intended in context to refer "only to a barking dog and a meowing cat." *Ibid.*

The court of appeals concluded that Section 213(b)(10) is similar. The court explained that "it is hard to imagine, in ordinary speech, a "mechanic primarily engaged in selling automobiles." Pet. App. 14-15. "[I]t seems that Congress intended the subject 'mechanic' to be connected to only one of the two verb clauses, 'servicing.'" *Id.* at 15. The court concluded that the same analysis applies to "salesman," because "[i]t is hard to imagine, in ordinary speech, [a] 'salesman primary engaged in servicing automobiles." *Ibid.* "The nature of the word 'salesman,'" the court reasoned, "strongly implies the actions that the person would take—selling." *Ibid.* In this statutory context therefore, the court concluded, "Congress likely intended the subject 'salesman' to be connected to only one of the two verb clauses, 'sell-

ing.'" *Ibid.* But because "Congress had not 'directly spoken to the precise question'" whether Section 213(b)(10)(A) applies to "service advisors," the court found the statute to be ambiguous. *Id.* at 8 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984)).

Second, the court of appeals held that the Department's 2011 notice-and-comment regulation reflects a reasonable determination that service advisors do not qualify for the exemption under Section 213(b)(10)(A). Pet. App. 8-19. The court first concluded that earlier subregulatory statements in the agency's 1978 opinion letter and 1987 FOH did not reduce the degree of deference owed to the 2011 regulation. *Id.* at 8-11. The court explained that the Department's regulations in 29 C.F.R. 779.372(c) had consistently interpreted Section 213(b)(10) for 45 years, and that the Department had carefully considered public comments addressing the question here before adopting its 2011 regulation. Pet. App. 9-10. Even if that regulation might be viewed as a "change in position," the court added, "an agency is permitted to change its position," and the Department both acknowledged the contrary views in the 1978 opinion letter and "rationally explained why, in its view," its final regulation properly construed the scope of the exemption. *Id.* at 10.

The court of appeals ultimately concluded that the Department's regulation reflected a reasonable and "permissible choice" to which deference is warranted. Pet. App. 11-19. The Department's regulation was consistent with a "natural reading" of the statutory text, the court explained, which "strongly suggests that Congress did not intend that both verb clauses

[selling or servicing] would apply to all three subjects" and that Congress instead "likely intended the subject 'salesman' to be connected to only one of the two verb clauses, 'selling.'" *Id.* at 14-15. In addition, the court added, the reading "does not render any term meaningless or superfluous," *id.* at 15, and is consistent with the "inconclusive" legislative history, *id.* at 15-19.

SUMMARY OF ARGUMENT

The court of appeals correctly accorded *Chevron* deference to the Department of Labor's 2011 interpretation of Section 213(b)(10)(A) in notice-and-comment regulations. Although Section 213(b)(10)(A) is not itself unambiguous on the precise question whether service advisors are exempted from the FLSA's overtime-pay requirements, its text, statutory context, and legislative history all strongly indicate that the provision exempts only salesmen who sell vehicles and partsmen and mechanics who service such vehicles—but not service advisors, on the rationale that they sell the servicing performed by others. The Department's construction of Section 213(b)(10)(A) to that effect is thus reasonable and entitled to deference.

1. A statute like Section 213(b)(10)(A) that uses a series of nouns (here, "salesman, partsman, or mechanic") followed by a series of gerunds ("selling or servicing") can be read in one of two ways. Sometimes, each of the antecedent nouns is intended to link to each gerund. Alternatively, when distributive phrasing is meant, each noun is properly understood to refer to an appropriate gerund. The interpretive canon *reddendo singula singulis* recognizes that drafters sometimes utilize distributive phrasing and that the proper interpretation of such language appropriately turns on the context in which it is used.

The fact that the word "or" is disjunctive will therefore address the relationship between the words in the noun series or in the gerund series, but does not resolve the relationship of the words in one series to those in the other.

Section 213(b)(10)'s statutory context strongly suggests distributive phrasing. First, the term "salesman" logically suggests the appropriate gerund phrase—"selling" vehicles—just as the terms "mechanic" and "partsman" are tied logically to "servicing" vehicles. Second, when Congress used the term "salesman" by itself in Section 213(b)(10)'s second clause, it utilized only the phrase "selling" vehicles. 28 U.S.C. 213(b)(10)(B). And Congress in that clause omitted the gerund "servicing" to effectuate its repeal of an overtime exemption for the employees properly linked to that term (mechanics and partsmen). *Ibid.* That drafting choice strongly suggests that Congress understood and intended Section 213(b)(10)(A) to apply only to salesmen "selling" vehicles and mechanics and partsmen "servicing" such vehicles, not to other employees who could be said to be "selling the servicing" of such vehicles. Indeed, the legislative history of Section 213(b)(10), beginning with NADA's original request for the exemption embodied in the 1966 amendments, indicates that Congress intended to exempt only those salesmen selling automobiles and other vehicles.

Petitioner's contention (Br. 19, 25) that service advisors are exempt because they are salesmen engaged in the "selling of the servicing of automobiles" fits poorly with the text of Section 213(b)(10)(A). Such a sales employee is not "primarily engaged in" either "selling * * * automobiles" or "servicing automo-

biles," as the provision requires, 29 U.S.C. 213(b)(10)(A). In particular, the task of "selling servicing" for vehicles is not naturally understood to constitute "servicing" such vehicles.

2. Although Section 213(b)(10)(A) does not itself put the issue beyond debate, the foregoing considerations show that the Department's implementation of the provision is reasonable and entitled to deference. *Chevron* deference applies where, as here, an agency exercises a general delegation of congressional authority to interpret the statute it administers. This Court has thus previously held that the Department's notice-and-comment rulemaking pursuant to the same statutory authority at issue here is entitled to *Chevron* deference.

Petitioner argues that deference is unwarranted because the Department failed to account for "reliance" on its 1978 opinion letter in a way that threatens "retroactive liability." But Congress expected such regulatory changes and enacted 29 U.S.C. 259(a) to avoid retroactive liability by providing a defense for good-faith reliance on superseded agency guidance like that invoked by petitioner. Moreover, petitioner's claim of far-reaching consequences is significantly overstated. The FLSA provides a separate overtime exemption for salesmen in retail or service establishments who receive more than half their earnings from commissions and earn more than 1.5 times the minimum wage. 29 U.S.C. 207(i). If service advisors at retail or service establishments are compensated as petitioner suggests, such employees would be exempt under that separate provision, but not under Section 213(b)(10)(A).

ARGUMENT

SECTION 213(b)(10)(A) DOES NOT EXEMPT "SERVICE ADVISORS" AT AUTOMOBILE DEALERSHIPS FROM THE FLSA'S OVERTIME-PAY REQUIREMENTS

Section 213(b)(10)(A) does not exempt from the FLSA's overtime-pay requirements "service advisors" at car dealerships. That provision, when read in context, carves out an overtime exemption for a "salesman" who is "primarily engaged in selling * * * automobiles," but not for a service advisor who sells the servicing of automobiles. The statutory text and drafting history strongly indicate that service advisors do not qualify for this exemption.

The first question under the Court's familiar *Chevron* analysis is "whether Congress has directly spoken to the precise question at issue" by making its intent on that question "unambiguous[]." *Chevron U.S.A. Inc.* v *NRDC*, 467 U.S. 837, 842-843 (1984). In the government's view, Congress did not speak so clearly as to put the point beyond dispute. That statutory ambiguity, however, was authoritatively resolved by the Department in its 2011 notice-and-comment implementing regulations, which interpret "salesman" in this context to mean an employee employed for the purpose of, and who is primarily engaged in, "making sales * * * of the automobiles" sold by the dealership. 29 C.F.R. 779.372(c)(1). As explained below, the Department's regulation is reasonable and is entitled to *Chevron* deference.

A. Section 213(b)(10)(A), While Not Unambiguous, Is Best Read Not To Exempt Service Advisors

Section 213(b)(10)(A)'s overtime exemption applies to "any salesman, partsman, or mechanic primarily

engaged in selling or servicing automobiles, trucks, or farm implements" if he is employed by a retail dealership primarily engaged in selling such vehicles or implements. 29 U.S.C. 213(b)(10)(A). The question presented in this case largely turns on the relationship between the first two disjunctively phrased series of words in that provision: (1) "salesman, partsman, or mechanic," and (2) "selling or servicing automobiles." Section 213(b)(10)(A)'s application to a "salesman" is best read to apply only to a "salesman" primarily engaged in "selling * * * automobiles," because the act of "servicing automobiles" logically ties only to a "partsman" or "mechanic" and not to a "salesman." Compare 29 U.S.C. 213(b)(10)(B) (linking "salesman" only with "selling" vehicles). Under that reading, service advisors, even if they qualify as a type of "salesman," fall outside the scope of Section 213(b)(10)(A) because they are primarily engaged in *selling the servicing* of automobiles, not selling the automobiles themselves.

1. Section 213(b)(10)(A)'s text and statutory context are best read as using distributive phrasing to exempt a "salesman" only when he is primarily engaged in "selling * * * automobiles"

a. Distributive phrasing properly links words in a series only to their appropriate referent

Section 213(b)(10)(A)'s contains a series of nouns ("salesman, partsman, or mechanic") and a subsequent series of gerunds ("selling or servicing"). The words in each series are linked by the term "or." That term is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390

(2014) (citation omitted). Accordingly, the nouns "salesman," "partsman," and "mechanic" are properly read as having independent meanings, as are the gerunds "selling" and "servicing." The disjunctive nature of "or" within each series, however, provides little definitive guidance beyond understanding the relationship between the series of words it joins. In particular, it does not resolve how Section 213(b)(10)(A)'s series of nouns and its series of gerunds relate to each other.[1]

A series of disjunctively phrased nouns and a subsequent series of disjunctively phrased gerunds or verbs may sometimes properly be read so that each noun applies to each gerund or verb. For instance, the sentence "any sixth-, seventh-, or eighth-grade student may elect studying, resting, or exercising during free periods" is naturally read as meaning any sixth-grader may study, rest, or exercise and any seventh- or eighth-grader has the same three options.

No grammatical rule, however, requires that noun and gerund/verb series always be read in that manner. The interpretive canon *reddendo singula singulis* ("referring each to each") recognizes that two series of words juxtaposed within a single sentence may

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[1] The disjunctive "or" can itself convey two different types of relationships between the words it connects. "Or" can carry the meaning of an exclusive disjunction (A or B, but not both) or an inclusive one (A or B or both). See Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80 St. John's L. Rev. 1167, 1180-1181 (2006); cf. 11 U.S.C. 102(5) (clarifying that "'or' is not exclusive" in the Bankruptcy Code). Thus, the phrase "selling or servicing" could be understood in the exclusive sense to suggest that an antecedent noun (such as a "salesman") is understood to engage in either "selling" or "servicing" automobiles, but not both.

properly be understood as reflecting "[d]istributive phrasing [that] applies each expression to its appropriate referent." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214 (2012) (*Reading Law*). Under that canon, for instance, the statutory phrase "'for money or other good consideration paid or given'" has long been understood as referring to "'money paid or other good consideration given'" because the "consequent 'paid'" in context should be read to refer to "the antecedent 'money'" and the "consequent 'given' to the antecedent 'consideration.'" Francis J. McCaffrey, *Statutory Construction* § 19, at 52 (1953); see Fortunatus Dwarris, *A General Treatise on Statutes*, Pt. 2, at 613 (2d ed. 1848) (same example; explaining that terms in such juxtaposed series are applied to "the subject-matter to which they appear by the context most properly to relate"). The sentence "letters are sent to any man or woman interested in joining a fraternity or sorority" similarly is properly read to describe letters sent only to any man interested in joining a fraternity and any woman interested in joining a sorority. Cf. *Reading Law* 214 (providing similar example).

Such applications of the distributive-phrasing canon are justified by "the simple observation" that English speakers "sometimes do combine multiple series of ideas in a distributive manner." R.N. Graham, *In Defense of Maxims*, 22 Statute L. Rev. 45, 57 (2001) (Graham); see Earl T. Crawford, *The Construction of Statutes* § 194, at 334 (1940) (*reddendo* canon "finds its justification in our use of the English language"). Although any ambiguity produced by using distributive syntax can be eliminated with sentences that directly connect each intended word pairing and sepa-

rate the paired words from the others, distributive phrasing yields a linguistic economy that continues to "appear from time to time in modern statutes." Graham 58. Cf. *Reading Law* 215-216 & n.8 (noting that "distributive-phrasing has largely fallen into disuse" in statutory drafting; citing Graham). The existence of such provisions[2] reflects that distributive phrasing is consistent with grammatical norms and that the meaning of provisions like Section 213(b)(10)(A) will not necessarily be resolved by the presence a disjunctive "or."

For instance, in *United States* v. *Simms*, 5 U.S. (1 Cranch) 252 (1803), the United States sought to recover a statutory penalty in the District of Columbia by invoking a Virginia statute authorizing "any person" to bring an action of debt for a $150 statutory penalty against the owner of an establishment at which unlawful gambling occurred. *Id.* at 252-253; see *id.* at 254. Although Congress had made that statute applicable to the portions of the District ceded by Virginia, the government "admitted that, under the laws of Virginia, an indictment for this penalty could not be sustained." *Id.* at 256. The government instead argued that Congress had established a "new

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[2] See, *e.g.*, 7 U.S.C. 1a(18)(a)(v)(III)(bb) ("an asset or liability owned or incurred"); 10 U.S.C. 2563(c)(1)(C) ("articles or services [that] can be substantially manufactured or performed" by certain facilities); 33 U.S.C. 1341(a)(4) (a "facility or activity shall be operated or conducted"); 42 U.S.C. 1396b(w)(1)(D)(ii) ("legislation or regulations * * * enacted or adopted"); 42 U.S.C. 4052(b)(2) ("profits or losses realized or sustained"); 43 U.S.C. 902 ("any patent or certification of lands erroneously patented or certified"); 47 U.S.C. 155(c)(3) ("any order, decision, report, or action made or taken" pursuant to delegated authority, where "taken" applies only to "action").

remedy" authorizing recovery of the penalty by indictment. *Ibid.* The statute forming the basis for that argument provided that "all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this [D]istrict, shall be recovered with costs, by indictment or information in the name of the United States, *or* by action of debt in the name of the United States and of the informer." *Id.* at 254 (emphasis added).

Chief Justice Marshall, writing for the Court, rejected the government's argument that the disjunctively phrased statute allowed it to collect the statutory penalty by indictment. *Simms*, 5 U.S. (1 Cranch) at 258-259. The Court instead invoked "*reddenda singula singulis*," *id.* at 259, to interpret Congress's authorization distributively, such that the United States could proceed by indictment only when the law of the particular State under which the penalty accrued would itself allow the State to proceed by indictment. *Id.* at 258-259. Because Virginia law allowed a *qui tam* relator to seek the statutory penalty only in an action in debt, the Court explained, it was "more proper to suppose the *qui tam* action * * * to be the remedy." *Id.* at 259.

b. Section 213(b)(10)'s text reflects the use of distributive phrasing

i. The touchstone for applying the *reddendo* principle, like statutory construction more generally, is context. Two primary contextual considerations in Section 213(b)(10)'s text strongly indicate that Congress intended Section 213(b)(10)(A) to exempt any "salesman" primarily engaged in "selling * * * automobiles" and intended the phrase "servicing automo-

biles" to apply only to a "partsman" or "mechanic," not a "salesman."

First, the term "salesman," as the court of appeals recognized, "strongly implies" the activity in the statutory provision to which the term applies: "selling * * * automobiles." Pet. App. 15. In common parlance, a "salesman" is not normally understood to be "primarily engaged in * * * servicing automobiles," 29 U.S.C. 213(b)(10)(A). "Servicing" automobiles is more logically tied to the mechanics and partsmen who engage in such servicing. Correspondingly, the term "mechanic" in Section 213(b)(10)(A) likewise indicates distributive phrasing. Otherwise, the provision would apply to a "mechanic" primarily engaged in "selling * * * automobiles," 28 U.S.C. 213(b)(10)(A). But just as a "salesman" does not primarily engage in "servicing" automobiles as those terms are commonly understood, neither does a "mechanic" primarily engage in "selling" automobiles.

Second, Section 213(b)(10)(B) demonstrates that when Congress separated "salesman" from "partsman" and "mechanic," Congress linked "salesman" *only* to the "selling" of the vehicles sold by their employers.

Section 213(b)(10)(A) and (B) were both enacted in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 65. The language for each of the provisions originated in H.R. 12435, as reported in the House of Representatives. Compare H.R. 12435, 93d Cong., 2d Sess. § 14, at 71-72 (Mar. 14, 1974) (as reported), with 29 U.S.C. 213(b)(10)(A) and (B).[3] The House Report accompanying that bill

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[3] After the House passed Section 213(b)(10)'s text in H.R. 12435, see 120 Cong. Rec. 7331, 7338 (1974), the House inserted the

explained that the bill's revision of Section 213(b)(10) was designed to "repeal[]" "[t]he overtime exemption for partsmen and mechanics" in establishments "selling aircraft and trailers" while retaining the pre-existing exemption for the "salesmen" in those establishments. H.R. Rep. No. 913, 93d Cong., 2d Sess. 47 (1974). The report further explained that the bill added a new exemption for "salesmen in non-manufacturing establishments primarily engaged in selling boats." *Ibid.* The House Report's description of the bill accordingly treated all of the "salesmen" that H.R. 12435 would exempt in the same manner, stating that the "salesmen in nonmanufacturing establishments primarily engaged in selling aircraft, automobiles, trucks, trailers, farm implements, and boats" would be exempt. *Ibid.* The bill's sponsor, Representative Dent, explained the conference agreement in the same way. 120 Cong. Rec. 8602 (1974).[4]

For the trailer-, boat-, and aircraft-selling establishments whose "salesman" (but not partsman or mechanic) is exempt, Congress enacted text exempting "any *salesman* primarily engaged in *selling* trailers, boats, or aircraft." 29 U.S.C. 213(b)(10)(B) (emphases added). That provision thus effectuated the repeal of the earlier exemption for partsmen and mechanics in trailer- and aircraft-selling establish-

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provisions of that bill into S. 2747, passed the latter, and requested a conference on S. 2747, *id.* at 7344, 7349. Congress adopted the House text in Section 213(b)(10). See H.R. Conf. Rep. No. 953, 93d Cong., 2d Sess. 11 (1974).

[4] Representative Perkins similarly had earlier explained that, under H.R. 12435's direct predecessor, boat "salesmen are treated like automobile, truck and agricultural implement salesmen." 119 Cong. Rec. 18,158 (1973); cf. H.R. Rep. No. 913, at 4 (discussing evolution of H.R. 12435 from H.R. 7935).

ments—not only by omitting the terms "partsman" and "mechanic," but also by omitting the *activity*—the "servicing" of trailers and aircraft—linked to those employees.

In doing so, Congress indicated its intent that an exempt "salesman" primarily engages in "selling" vehicles, and that "servicing" such vehicles is performed only by partsmen and mechanics. Congress's contemporaneous decision to retain the gerund "servicing" in Section 213(b)(10)(A) thus reflects that Section 213(b)(10)(A) uses distributive phrasing to connect the word "salesman" only to "selling" vehicles and the words "partsman" and "mechanic" to "servicing" vehicles. That use of "salesman" directly tracks the Department's 1970 Interpretive Bulletin's interpretation of "salesman," 29 C.F.R. 779.372(c)(1) (1971), with which Congress was presumably familiar when it enacted Section 213(b)(10)(A) and (B) in 1974.

ii. Petitioner argues (Br. 29-30) that Section 213(b)(10)(A) must be read to cover a service advisor, on the rationale that such an employee who sells the servicing of automobiles is a "salesman" who is "primarily engaged in * * * servicing automobiles," 29 U.S.C. 213(b)(10)(A). Any other reading, petitioner asserts (Br. 30), would render the provision's application to a "partsman" a nullity. That is incorrect.

The phrase "to engage in servicing automobiles," when used in ordinary language, means "to employ or involve oneself" and "to take part" in "repair[ing] or provid[ing] maintenance for" automobiles. See *Webster's Third New International Dictionary* 751 (1966) (defining the verb "engage"); *id.* at 2075 (defining the verb "service"). Unlike a service advisor, a partsman is naturally understood to involve himself in repairing

or providing maintenance for automobiles by working with a mechanic and "dispensing parts," 29 C.F.R. 779.372(c)(2).[5] An English speaker would regard an individual who hands parts to a mechanic while the mechanic installs them on a car to be himself involved in repairing or providing maintenance for the car, even if he does not personally install the parts. See Resp. Br. 32-35 (describing cooperation between partsmen and mechanics). A mechanic, of course, might be able to obtain the parts to complete a repair without the real-time assistance of a partsman by his side. But that merely reinforces the conclusion that a partsman is involved in repairing or providing maintenance because he performs key tasks in repairing the vehicle. Dividing those tasks between two individuals reflects that both the mechanic and the partsman are logically understood as involved in repairing ("servicing") the vehicle.

A service advisor, by contrast, plays no similar role. Petitioner repeatedly argues that a service advisor is engaged in the service "process" because he is "engaged in the *selling of the servicing* of automobiles." Pet. Br. 19, 23, 25 (emphasis added). But an individual who simply suggests to the customer the servicing to be performed, and in that sense is "selling" the servicing, is not naturally understood to be "primarily engaged in * * * servicing automobiles," because he does not primarily "involve [him]self" and

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[5] The Department interprets a "partsman" to be an employee who "dispens[es] parts" and the associated duties of "requisitioning" and "stocking" parts. 29 C.F.R. 779.372(c)(2). The Department similarly interprets a "salesman" as one who not only sells vehicles but performs work "incidental to and in conjunction with the employee's own sales or solicitations." 29 C.F.R. 779.372(c)(1).

"take part" in "repair[ing] or provid[ing] maintenance for" such automobiles. See *Webster's Third New International Dictionary* 751, 2075. Just as a person who sells plastic surgery, technical support, or house painting is not by virtue of his salesmanship actually *engaged in* plastic surgery, technical support, or painting, a service advisor who *sells* servicing is not engaged in that servicing. The servicing is performed later, by others.

Petitioner asserts (Br. 25) that it would be "nonsensical to suggest that an individual who is primarily engaged in selling the servicing of automobiles is engaged in neither selling nor servicing automobiles." But petitioner loses sight of the FLSA's text. It is entirely sensical to conclude that an individual "*selling* the *servicing* of automobiles," *ibid.* (emphasis added), is neither "selling * * * automobiles" nor "servicing automobiles," as Section 213(b)(10)(A) requires. Petitioner does not argue that service advisors are primarily engaged in selling automobiles. And, as explained, the job of "selling the servicing" is not the same as actually servicing automobiles. Petitioner's reading makes a hash of the statutory phrase "selling *or* servicing automobiles" by reading Section 213(b)(10) to cover the "selling *of* servicing automobiles."

2. Section 213(b)(10)'s legislative history indicates that Congress understood the exemption to apply only to those salesmen who sell vehicles

Section 213(b)(10)'s legislative history similarly reflects that Congress intended the provision to be read distributively to exempt only a "salesman * * * selling * * * automobiles."

Beginning with NADA's initial 1965 request for the overtime exemption, the legislative history reflects the understanding that Section 213(b)(10)'s exemption for salesmen would apply simply to salesmen of vehicles or farm implements. NADA justified the exemption by explaining that the "automobile salesmen" who would be exempt are "extremely well-paid employees" who did not need overtime protection. *1965 House Hearing* 368. Moreover, NADA's representative testified, it would be "practically impossible" to "keep accurate records of the time [a salesman] spends working" because "[a] salesman * * * is actually selling, or trying to sell, every place he goes where he is in contact with the public" and therefore "spends a substantial number of hours performing his duties away from the dealer's place of business." *Id.* at 368-369; see *id.* at 372. That description applies to automobile salesmen but not to service advisors, who are posted in, and do their selling from, the dealer's premises.

The floor debates on Section 213(b)(10) suggest no intent to exempt employees like service advisors. Reflecting NADA's rationale for exempting salesmen of automobiles, Senator Yarborough explained that "salesmen * * * do not get overtime because their work is outside" and "[t]he reason for exempting the salesmen" from the overtime requirement "was the difficulty of their keeping regular hours." 112 Cong. Rec. 20,504 (1966). "The salesman tries to get [customers] mainly after their hours of work" when customers are able to "look at automobiles." *Ibid.* For that reason, the bill's exemption was designed to allow a "salesman * * * [to] go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night." *Ibid.*;

see *ibid.* (statement of Sen. Bayh) ("Salesmen are a little different breed of cats, because they go out at unusual hours, trying to earn commissions.").

Similarly, when Congress considered legislation that led to the 1974 Fair Labor Standards Amendments, NADA urged retaining Section 213(b)(10)'s exemption with statistics illustrating the adequacy of the salaries of "car and truck salesmen," "partsmen," and "automobile mechanics." *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. Pt. 2, at 780, 783 (1971). NADA again explained "salesmen" spend "substantial" time working away from the dealership. *Id.* at 780. And NADA's representative specifically discussed mechanics' work with "service advisors[s]" or "service manager[s]" but never suggested that the latter were exempt under Section 213(b)(10). See *id.* at 780-781.

3. There is no occasion in this case to rely on the principle that FLSA exemptions are narrowly construed

Petitioner contends (Br. 34-35) that the Ninth Circuit erred by "effectively appl[ying] a clear statement rule" requiring a "narrow construction" of FLSA exemptions and that this Court should reject such a rule by requiring exemptions to be read "fairly and correctly." This Court's decisions, however, have long established that a narrow construction of ambiguous FLSA exemptions is the correct method to construe the Act. In any event, this case presents no occasion to address that principle. The court of appeals did not rest its judgment on the principle, and the question presented is properly resolved without relying on it.

It has long been "well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959); see *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). "Breadth of coverage was vital to [the Act's] mission," which Congress has declared in "bold and sweeping terms" with only "narrow and specific" exemptions. *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516-517 (1950).

That FLSA principle is a particularly well grounded variant of the interpretive rule that "[a]n exception to a 'general statement of policy' is 'usually read narrowly in order to preserve the primary operation of the provision.'" *Maracich* v. *Spears*, 133 S. Ct. 2191, 2200 (2013) (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)); see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995). Unless "commanded by the text," such "exceptions ought not operate to the farthest reach of their linguistic possibilities," *Maracich*, 133 S. Ct. at 2200, lest they "eviscerate th[e] legislative judgment" underlying the "general rule" that they would displace. *Clark*, 489 U.S. at 739. And because that principle applies when construing exceptions from a general rule, it does not extend to contexts involving "general definition[s] that appl[y] throughout the FLSA." *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012); see *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 879 (2014).

In this case, the narrow-construction principle does not affect the proper disposition. Where, as here, an agency has exercised its "legislative[ly] delegat[ed]" authority to resolve ambiguity in "the statute by regulation," "a court may not substitute its own construc-

tion" for that of the agency if the agency has adopted a "reasonable interpretation," even if "the court would have reached" a different reading on its own. *Chevron*, 467 U.S. at 843 n.11, 844; see *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005); cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001).

The court of appeals appears to have followed that course in this case. Although it noted the "background rule" that FLSA exemptions are narrowly construed, Pet. App. 6, the court concluded that the scope of Section 213(b)(10)'s exemption is itself ambiguous, *id.* at 7-8, before adding that application of the narrow-construction canon could not "aid [petitioner]" in this case, *id.* at 8. The court therefore proceeded under *Chevron*'s analytical framework to determine that the Department's notice-and-comment regulation reasonably interpreted the statute's ambiguous text and was entitled to deference. *Id.* at 11; see *id.* at 11-19. In doing so, the court briefly noted that the Department's interpretation "accords with the presumption that the § 213 exemptions should be construed narrowly," while emphasizing that the agency's interpretation need not be the "best construction" to warrant *Chevron* deference. *Id.* at 11 (citation omitted).

This case thus does not present an occasion to address whether the FLSA's exemptions should be narrowly construed when an agency interpretation reaches a different result or in the absence of any administrative interpretation. The agency's interpretation here not only is a reasonable reading of Section 213(b)(10)(A), it is the better one. That holds true

regardless whether Section 213(b)(10)(A) should be narrowly construed.

B. The Department's Notice-And-Comment Regulations, Which Reasonably Implement Section 213(b)(10)(A), Are Entitled To *Chevron* Deference

For the reasons stated above, the text, statutory context, and legislative history strongly suggest that Congress utilized distributive phrasing in Section 213(b)(10)(A) to exempt from the Act's overtime requirements those salesmen who are primarily engaged in "selling * * * automobiles," but not service advisors. In the government's view, however, those factors do not sufficiently show that "Congress has directly spoken to the precise question at issue" by expressing an unambiguous intent to exclude service advisors under Section 213(b)(10)(A), see *Chevron*, 467 U.S. at 842-843.

They do, however, demonstrate that the Department reasonably concluded in its 2011 rulemaking that a "salesman" must be primarily engaged in selling vehicles, 29 C.F.R. 779.372(c)(1); that the exemption "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle"; and that "service advisors" accordingly are not exempt under Section 213(b)(10)(A), see 76 Fed. Reg. 18,838 (Apr. 5, 2011). Petitioner, however, argues that the Department's notice-and-comment regulation is a mere "interpretive" rule given a lesser degree of deference, Br. 40-41, and that deference is unwarranted because the regulation does not sufficiently justify upsetting settled expectations and would produce significant adverse consequences, Br. 40-45. Those contentions are without merit.

1. The Department's regulations are reviewed for reasonableness under Chevron

Petitioner states (Br. 36-37) that the Department's 2011 regulations implementing Section 213(b)(10) are entitled to "less deference" than a legislative rule and, as such, may be upheld only if "reasonable." To the extent petitioner seeks to distinguish between arbitrary-and-capricious review, which applies when Congress "explicitly le[aves] a gap for the agency to fill," and the traditional type of *Chevron* deference owed to an agency's "reasonable" statutory interpretation, which applies when Congress "implicit[ly]" vests an agency with authority to resolve ambiguity in a statute it administers, see *Chevron*, 467 U.S. at 843-844, the government agrees that "reasonableness" deference is warranted. Such "implicit" delegations are often reflected in an "agency's generally conferred authority," indicating Congress's intent that the agency will "speak with the force of law when it addresses ambiguity in the statute." *Mead Corp.*, 533 U.S. at 229; see *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013) ("[N]o" case has ever held that "a general conferral of rulemaking or adjudicative authority" is "insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.").

Congress delegated such authority to the Department by expressly authorizing it to issue rules and regulations concerning this exemption. The exemption was adopted in the Fair Labor Standards Amendments of 1966 and revised in similar amendments in 1974, and both statutes confer authority to prescribe "necessary rules, regulations, and orders with regard to the amendments" made therein. Pub. L. No. 93-

259, § 29(b), 88 Stat. 76; see Pub. L. No. 89-601, § 602, 80 Stat. 844. The Department's 2011 invocation of notice-and-comment rulemaking to exercise that authority reflects a prototypical example of agency action entitled to *Chevron* deference. See *Mead Corp.*, 533 U.S. at 229. Indeed, this Court has already held that the 1974 Act's rulemaking provision authorizes the Department to "fill gaps [in a Section 213(b) exemption] through rules and regulations" that are then entitled to *Chevron* deference. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007).

2. The Department sufficiently justified its 2011 regulations, which do not impose retroactive liability

Petitioner argues (Br. 40-42) that the Department's 2011 regulations are not entitled to deference because the Department did not sufficiently "explain[] the changes in policy [or] account[] for reliance interests" arising from the agency's 1978 opinion letter and 1987 Field Operations Handbook. The agency, however, fully satisfied its obligation to engage in reasoned decisionmaking by showing an "awareness" of its prior interpretations and "good reasons" for its 2011 regulations, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox*). See 76 Fed. Reg. at 18,838 (discussing 1978 opinion letter and basis for current regulatory interpretation); 73 Fed. Reg. 43,654, 43,659 (July 28, 2008) (discussing 1987 Handbook).

Petitioner incorrectly suggests that the Department's interpretation of Section 213(b)(10) altered a prior policy engendering "serious reliance interests" that the agency needed to address. Br. 41 (quoting *Fox*, 556 U.S. at 515, and citing *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 742 (1996)). The type of reliance interests suggested by *Fox* and *Smiley* involve the

imposition of retroactive civil liability for "past actions * * * taken in good-faith reliance on [agency] pronouncements," *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (dictum), or criminal liability for past actions taken in good-faith reliance on an agency interpretation erroneously treating unlawful conduct as lawful, *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670-675 (1973) (holding a good-faith defense may be asserted). Such interests are not implicated by 29 C.F.R. 779.372(c), which has no untoward retroactive effects.

Although petitioner suggests that the 2011 regulations create "retroactive liability," Br. 43, petitioner is mistaken. Congress specifically contemplated that, in the course of its administration of the FLSA, the Department would from time to time modify or rescind its administrative measures such as regulations, rulings, and interpretations. See 29 U.S.C. 259(a). The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, accordingly provides that an employer sued for alleged FLSA violations "shall [not] be subject to any liability" for failing "to pay minimum wages or overtime compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Department's Wage and Hour Division]," even if that agency guidance has since been "modified or rescinded." 29 U.S.C. 259(a) and (b)(1); see 29 C.F.R. 790.13. The 2011 regulations thus should not produce "retroactive liability," because an appropriate defense should be recognized for service advisors' overtime claims accruing before the regulations' May 5, 2011

effective date. Cf. 76 Fed. Reg. at 18,832 (effective date).

The Department acknowledged NADA's contention that the "automobile and truck dealership industry ha[d] relied upon the Administrator's 1978 opinion letter" concerning service advisors. 76 Fed. Reg. at 18,838. But the final rule became effective one month after its publication in the Federal Register, *id.* at 18,832, thereby allowing a reasonable transition away from any unlawful employment practices and the prospective documentation of wages and hours by employers of service advisors. Nothing more was necessary.[6]

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[6] NADA's actions confirm that automotive dealers have had ample notice of the Department's 2011 regulations. Once the Department published the regulations, NADA successfully persuaded Congress to enact an appropriations rider temporarily prohibiting the Department from enforcing the FLSA's overtime-pay requirements with respect to service advisors by prohibiting appropriated funds from being used to "administer or enforce 29 C.F.R. 779.372(c)(4)." Department of Labor Appropriations Act, 2012, Pub. L. No. 112-74, Div. F, Tit. I, § 113, 125 Stat. 1064 (enacted Dec. 23, 2011); see NADA Press Release, *House Appropriations Subcommittee Preserves Service Advisors Overtime Exemption* (July 18, 2012), http://www.nadafrontpage.com/Service_Advisors_Overtime_Exemption.xml. That rider continued in force under continuing resolutions, but ceased to have effect with the January 2014 enactment of the Department of Labor Appropriations Act, 2014, Pub. L. No. 113-76, Div. H, Tit. I, 128 Stat. 347. See J. Res. of Jan. 14, 2014, Pub. L. No. 113-73, 128 Stat. 3; Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. A, § 101(a)(6), 127 Stat. 558; Full-Year Continuing Appropriations Act, 2013, Pub. L. No. 113-6, Div. F, Tit. I, § 1101(a)(4), 127 Stat. 412; Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, § 101(a)(8), 126 Stat. 1313. Despite having adopted a temporary rider to halt governmental enforcement actions, Congress

3. Petitioner's claims of far-reaching consequences are misplaced

Petitioner's assertion (Br. 42-45) of "far-reaching consequences" stemming from a purported "retroactive reclassifi[cation]" requiring overtime pay creating "potentially significant retroactive liability" is misplaced in light of the prospective application of the Department's regulations discussed above. See pp. 32-33, *supra*. Moreover, petitioner ignores the fact that service advisors may be exempt under a different FLSA exemption applicable to retail salesmen paid on commission. See 29 U.S.C. 207(i). Petitioner repeatedly emphasizes that respondents, like many service advisors at automobile dealerships, are paid on a commission basis, suggesting that overtime pay is unwarranted in light of such incentive-based pay. See, *e.g.*, Pet. Br. 1, 7, 13 & n.4, 38-39, 42-44. Although Section 213(b)(10)'s overtime exemption depends on the nature of an employee's work as a "salesman," "partsman," or "mechanic," without regard to the method of compensating the employee, Section 207(i) separately accounts for petitioner's commission-focused concerns.

Congress in Section 207(i) defined the category of commission-earning salespersons that it determined should be exempt from overtime pay. That provision exempts any employee of "a retail or service establishment" who is paid "more than half his compensation" in "commissions on goods or services" if the employee's "regular rate [of pay] is more than one and one-half times the minimum [federal] hourly rate." 29

---

neither overturned the Department's 2011 regulations nor amended Section 213(b)(10) to apply to service advisors.

U.S.C. 207(i). At the current $7.25/hour federal minimum wage, which became effective in 2009, see 29 U.S.C. 206(a)(1)(C), such employees must earn at least $10.88/hour, which corresponds to $22,696/year for a standard 2087-hour work year. Cf. 5 U.S.C. 5504(b) (work year).

Nothing suggests that dealerships like petitioner, which are "primarily engaged in the business of selling [automobiles] to ultimate purchasers," 29 U.S.C. 213(b)(10)(A), would be unable to qualify as a "retail or service" establishment under Section 207(i). To the contrary, Congress enacted Section 207(i) with automobile dealerships in mind.[7] And if service advisors paid "primarily on sales commissions rather than hourly wages" are as "well compensated" as petitioner suggests (Br. 7, 40, 42), such employees should fall within the Section 207(i) overtime-pay exemption. If not, petitioner provides no reason why such lower-paid employees should be denied the overtime available to similarly situated sales personnel in other businesses.

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[7] See, *e.g.*, 106 Cong. Rec. 15,195 (1960) (statement of Rep. Dent) (explaining that Section 207(i) reflects an agreement accepted by "automobile dealers" that would exempt salesmen earning "1½ times the legal minimum wage" when "50 percent or more of that income comes from commissions"); *id.* at 15,220 (statement of Rep. Roosevelt) (explaining that "the automobile dealers' problem has been solved" by Representative Dent's amendment).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General

M. PATRICIA SMITH
Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
PAUL L. FRIEDEN
Counsel for Appellate Litigation
MELISSA A. MURPHY
LAURA M. MOSKOWITZ
Senior Attorneys
Department of Labor

APRIL 2016

APPENDIX

1. 29 U.S.C. 207 provides in pertinent part:

Maximum hours

* * * * *

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

* * * * *

2. 29 U.S.C. 213 (1970) provided in pertinent part:

Exemptions

* * * * *

(b) The provisions of section 207 of this title shall not apply with respect to—

* * * * *

(10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or

* * * * *

3. 29 U.S.C. 213 provides in pertinent part:

Exemptions

* * * * *

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

* * * * *

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

* * * * *

4. 29 U.S.C. 259 provides in pertinent part:

Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.]—the Administrator of the Wage and Hour Division of the Department of Labor;

* * * * *

5. 29 C.F.R. ¶779.372 (1971) provided in pertinent part:

Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

* * * * *

(c) *"Salesman, partsman, or mechanic."* (1) As used in section 13(b)(10), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, farm implement, or aircraft mechanics, body or fender mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile,

trailer, truck, farm implement, or aircraft for its use and operation as such. This includes mechanical work required for safe operation as a vehicle, farm implement, or aircraft. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who performs no mechanical repair work is not exempt. When employed by an establishment qualifying under section 13(b)(10) which sells and services trailers, mechanics primarily engaged in servicing the trailers for their use and operation as such may qualify for the exemption. "Trailers" include a wide variety of nonpowered vehicles used for industrial, commercial, or personal transport or travel on the highways by attaching the vehicle to the rear of a separate powered vehicle. It is not yet clear under what circumstances and to what extent so-called "mobile homes" designed for residential uses other than in connection with the owner's travel can qualify as "trailers" within the meaning of the statute. (Compare Snell v. Quality Mobile Home Brokers (D.S.C.), 18 WH Cases 875, with Wirtz v. Louisiana Trailer Sales, 294 F Supp. 76 (E.D. La.).) However, if and to the extent that they are operated and used as trailers, mechanics servicing them for such operation and use would appear to be performing work within the purview of the exemption provided for mechanics in section 13(b)(10), to the

same extent as mechanics servicing automobiles, ordinary travel, boat, or camping trailers, trucks, and truck or tractor trailers for use and operation as such. On the other hand, there is no indication in the statutory language or the legislative history of any intent to provide exemption for mechanics whose work is directed to the habitability as a residence of a dwelling to be used as such on a fixed site in a particular locality, merely because the home is so designed that it may be moved to another location over the highways more readily than the traditional types of residential structures. Accordingly, servicemen checking, servicing, or repairing the plumbing, electrical, heating, air conditioning or butane gas systems, the doors, windows, and other structural features of mobile homes to make them habitable or more habitable as residences are, while so engaged, not deemed to qualify as "mechanic(s) * * * servicing * * * trailers" within the meaning of section 13(b)(10).

(4) Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's partsman's, or me-

chanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishment's annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

6. 29 C.F.R. 779.372 provides in pertinent part:

Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

* * * * *

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical

work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishments annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

Supreme Court, U.S.
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No. 15-415

IN THE

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND RETAIL LITIGATION CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
WARREN D. POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

MATTHEW W. LAMPE
Counsel of Record
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mwlampe@jonesday.com

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

E. MICHAEL ROSSMAN
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215

Counsel for Amici Curiae

(Additional counsel listed on inside cover)

RYAN J. WATSON
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

QUESTION PRESENTED

Whether "service advisors" at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the Fair Labor Standards Act's overtime-pay requirements.

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing 325,000 members across the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

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[1] Counsel for both Petitioner and Respondents have filed. with the Clerk of this Court, blanket consent to the filing of *amicus curiae* briefs. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Collectively, the foregoing *amici* represent a wide cross-section of the employer community throughout the United States. American employers dedicate considerable time, energy, and resources to achieving compliance with the myriad statutes governing the workplace, including the Fair Labor Standards Act ("FLSA" or "Act"), while at the same time maintaining and creating much-needed jobs. *Amici*'s members therefore have a strong interest in fostering statutory interpretation that is fair, predictable, and evenhanded—rather than having courts unjustifiably put a thumb on the scales at the outset of the interpretive process. This case affords the Court an opportunity to advance this sensible approach to interpretation of workplace laws by rejecting the unwarranted canon that FLSA exemptions must be narrowly construed.

INTRODUCTION AND SUMMARY OF ARGUMENT

"On occasion, a would-be doctrinal rule or test finds its way into [this Court's] case law through

simple repetition of a phrase—however fortuitously coined." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 531 (2005). When it becomes apparent, however, that such "repetition of a phrase" is "doctrinally untenable," this Court has properly stepped in to "correct course" and hold that the phrase—however familiar it may be—"has no proper place in [its] jurisprudence." *Id.* at 531, 544, 548 (emphasis omitted).

This case calls for just such a clarification. From time to time, this Court has stated "that remedial statutes should be liberally construed" to effectuate their remedial purpose. *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). In 1945, this Court went one step further by stating that, because the FLSA was "designed to extend the frontiers of social progress," purposeful, *explicit exemptions* to such "humanitarian and remedial legislation" should "be narrowly construed." *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (internal quotation marks omitted). "[T]hrough simple repetition," *Lingle*, 544 U.S. at 531, this statement has seeped into the caselaw and produced the canon that FLSA exemptions should be narrowly construed.

While this Court has in practice placed little weight on the notion that FLSA exemptions should be narrowly construed, the Ninth Circuit placed substantial weight on that canon to hold that service advisors at automobile dealerships are not exempt from the FLSA's overtime-pay provision. *See Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271–73 & n.3 (9th Cir. 2015). That reliance was misplaced.

As an initial matter, there is no basis in either law or logic to infer that Congress means more (or less) than it says in a statute, simply because the legislation might be described as "remedial." *See, e.g.*, Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev 581, 581–86 (1990). Indeed, the canon that remedial statutes should be liberally construed rests on a fundamental misconception about the legislative process—namely, that Members of Congress draft statutes to pursue a single objective without compromise or moderation. Moreover, the liberal-construction canon is unsupportable because it is "indeterminate, as to both when it applies and what it achieves." *Id.* at 586. For these reasons, courts should not assume that Congress intends for so-called "remedial" statutes to extend more broadly than their text, structure, and purpose indicate.

Moreover, the liberal-construction canon's supposed corollary—that courts should assume Congress is less than sincere when it includes explicit exemptions to a "remedial" statute—is doubly flawed, particularly in the FLSA context. The numerous exemptions to the so-called "remedial" provisions of the Act clearly demonstrate that Congress did *not* intend the Act to impose limitless burdens on employers. It is especially problematic to assume that the exemption at issue here—which encompasses "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," 29 U.S.C. § 213(b)(10)(A)—should be construed more narrowly than its plain text would otherwise indicate. Congress amended this exemption repeatedly to calibrate its scope, making

perfectly clear that it did not wish the FLSA to be unthinkingly extended in this context.

The Court should make clear that exemptions to the FLSA should be reflexively construed neither narrowly nor broadly but, rather, should be construed correctly. The proper approach to interpreting FLSA exemptions is of course squarely presented in this case, which calls for the Court to interpret § 213(b)(10)(A)'s automobile dealership exemption. Moreover, *stare decisis* presents no obstacle to disapproving the canon, because *amici* are unaware of any decision in which the canon represented an essential part of this Court's holding. At the same time, FLSA caselaw suggests that the canon is not simply an ill-advised, yet harmless turn of phrase; rather, lower court opinions indicate that this canon has distorted the process of interpreting the FLSA. Consequently, the Court should make clear that this rule "has no proper place in [its] jurisprudence." *Lingle*, 544 U.S. at 548.

ARGUMENT

I. THIS COURT SHOULD REJECT THE UNJUSTIFIABLE CANON THAT EXEMPTIONS TO THE FLSA MUST BE NARROWLY CONSTRUED.

The canon that FLSA exemptions should be narrowly construed descends from the following statement of the Court in *AH Phillips*:

> The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. Any exemption from such humanitarian and remedial legislation must therefore be

> narrowly construed To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

324 U.S. at 493 (internal quotation marks and citation omitted). This hostile view toward exemptions to "remedial" statutes, in turn, is an application of "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

As discussed in detail below, the canon that remedial statutes should be liberally construed is flawed. *See infra* at § I.A. And this canon's purported corollary—that courts should narrowly construe exemptions to remedial statutes—only exacerbates the flaws inherent in the liberal-construction canon. *See infra* at § I.B. Perhaps this is why Respondents offer only a tepid, one-paragraph endorsement of the notion, featured prominently in the decision below, that FLSA exemptions must be narrowly construed. *See* Br. in Opp'n 22.

A. The Canon That a Remedial Statute Should Be Liberally Construed to Effectuate Its Purposes Is Flawed.

The notion that a remedial statute must be broadly construed to advance its purposes—which an eight-Justice majority aptly labeled the "last redoubt of losing causes," *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995)—suffers from three severe flaws.

1. The liberal-construction canon rests on an elemental misunderstanding of the legislative process. Leading jurists and commentators have laid bare the erroneous premise that underlies this canon—namely, that Congress intends statutes to extend as far as possible in service of a single objective. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 21, 362–63 (2012); Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 808–09 (1983). As Judge Posner succinctly put it, this canon "goes wrong by being unrealistic about legislative objectives." *Statutory Interpretation*, *supra* at 808–09.

In reality, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam); *see also OWCP*, 514 U.S. at 135–36. Instead, legislators inevitably balance how far a statute should go toward achieving one particular objective against various other objectives that they or their colleagues also value. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033–34 (2014) ("'Congress wrote the statute it wrote'—meaning, a statute going so far and no further."); *Rodriguez*, 480 U.S. at 525–26; *OWCP*, 514 U.S. at 135–36.[2] Indeed, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez*, 480 U.S. at 525–26; *see also OWCP*, 514 U.S. at 136 ("Every statute proposes, not

[2] This point is uncontroversial. Eight Justices joined the opinion in *OWCP*, and no Justice expressed disagreement with this point in *Rodriguez*. *See Rodriguez*, 480 U.S. at 525–26; *OWCP*, 514 U.S. at 135–36.

only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be."). In short, as the Court in *Bay Mills* recently explained, "[t]his Court has no roving license to disregard clear language simply on the view that Congress 'must have intended' something broader." 134 S. Ct. at 2034.

As a result, when courts analyze the balance struck by Congress in a remedial statute, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." *Assorted Canards*, *supra* at 582; *see also id.* at 581–86; *Reading Law*, *supra* at 21, 362–63. Doing otherwise "would upset the compromise that the [remedial] statute was intended to embody." *Statutory Interpretation*, *supra* at 809; *see also Bay Mills*, 134 S. Ct. at 2034; *Rodriguez*, 480 U.S. at 526. To be sure, divining congressional intent "may often be difficult, but [there is] no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales" when interpreting a remedial statute. *Assorted Canards*, *supra* at 582.

Because the aim of statutory interpretation is to assess congressional intent, the rule of construing remedial statutes broadly reflects an assumption that Congress would have intended for some statutes to prohibit or require more than their text, structure, and purpose would otherwise indicate. But there is no reason to think that Congress is more or less timid in expressing its will through the text and structure of certain statutes, simply because those laws might

be "remedial" in some vague, undefined sense. Consequently, the Court has emphasized that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526; *see also Bay Mills*, 134 S. Ct. at 2034.

2. Another ill that infects the liberal-construction canon is that there is virtually no clarity about *when* the canon should apply. Indeed, "there is not the slightest agreement on what the phrase 'remedial statutes'" means. *Assorted Canards*, *supra* at 583; *see also id.* at 586. Accordingly, even accepting the liberal-construction canon on its own terms, courts are left to speculate about *when* the canon should apply.

To be sure, the term "remedial" has been defined as "'intended for a remedy or for the removal or abatement of an evil.'" *Assorted Canards*, *supra* at 583 (quoting *Webster's Third New International Dictionary* 1920 (1961)). Similarly, *Black's Law Dictionary* defines the phrase "remedial statute" to mean (1) "[a]ny statute other than a private bill; a law providing a means to enforce rights or redress injuries" or (2) "[a] statute enacted to correct one or more defects, mistakes, or omissions." *Id.* (10th ed. 2014). These definitions, however, serve only to illustrate how unworkable the liberal-construction canon is: If courts must liberally construe any statute that aims to create a remedy or mitigate an evil, then *all* statutes are in some sense remedial, "since one can hardly conceive of a law that is not meant to solve some problem." *Assorted Canards*, *supra* at 583; *see also Reading Law*, *supra* at 364 ("Is

any statute *not* remedial? Does any statute *not* seek to remedy an unjust or inconvenient situation?"); *Statutory Interpretation*, *supra* at 809. And if the liberal-construction canon applies to *all* statutes, thus "leaving nothing to be construed straight down the middle," *Assorted Canards*, *supra* at 585, then the canon has little or no meaning.

3. Assuming for the sake of argument that one could settle on a useful definition of what statutes are "remedial," the liberal construction canon would still remain hopelessly malleable and manipulable. After all, after one lets go of the conventional tools of statutory interpretation, there is no objective means of determining "[h]ow liberal is liberal." *Assorted Canards*, *supra* at 582.

"[I]t is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 28 (1997). The result is that this canon "can be used, or not used, or half-used, almost *ad libitum*, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve." *Id.*; *A Matter of Interpretation*, *supra* at 27–28.

B. The Notion That FLSA Exemptions Should Be Narrowly Construed Against Employers Doubles Down on the Flaws Inherent in the Liberal-Construction Canon.

The purported corollary of the liberal-construction rule is that exemptions to the FLSA should be narrowly construed. But this principle, which was spawned in *AH Phillips*, only doubles down on the flaws inherent in the liberal-construction canon.

Even assuming that "remedial" statutes should be broadly construed, there is simply no basis to conclude that Congress intends remedial statutes to be extended *in the face of an express exemption.* In such instances, by definition, Congress has explicitly stated that it does *not* wish the statute to be extended broadly. And there is no reason to believe, in the abstract, that Congress in these situations does not mean what it says, or that it feels more strongly about the statute's prohibitions than its exemptions.

Indeed, one could just as easily say that *exemptions* to remedial statutes are themselves "remedial," as they are intended to remedy the otherwise excessive scope of more general provisions. Accordingly, if one took seriously the rule of broadly construing "remedial" provisions, there is at least as strong an argument that statutory *exemptions* should be read broadly. Of course, such complexity and confusion can be avoided simply by interpreting the exemptions through the standard tools of statutory construction, without handicapping one outcome over another.

Placing a thumb on the interpretive scale is particularly inappropriate in the context of the FLSA for two reasons, each of which is explored below.

1. Congress included so many exemptions to the so-called "remedial" provisions of the FLSA that it is particularly implausible to assume Congress had no concern for the FLSA's breadth. Like any statute, the FLSA embodies a balance of legislative priorities. On the one hand, the Act protects the "'health, efficiency, and general well-being of workers,'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450

U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)), by requiring employers to provide certain employees with benefits such as overtime pay, 29 U.S.C. §§ 206, 207. On the other hand, the Act includes numerous exemptions recognizing that FLSA protections are unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See* 29 U.S.C. § 213(a).

Specifically, Congress excluded from the FLSA's general protections over 50 categories of employees ranging from white collar workers, to fishermen and seamen, to employees of movie theaters or the maple syrup industry. It is, therefore, implausible to suggest that Congress was shy about carving out exemptions or that it intended to disfavor employers at every turn. In fact, as discussed below, Congress amended the FLSA precisely "to curtail employee-protective interpretations of the FLSA." *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007). Consequently. construing the FLSA based on the assumption that Congress uniformly intended to disfavor employers "contravenes the readily apparent intent" of Congress. *Id.*

The FLSA's automobile dealership exemption provides a perfect example. In 1961, Congress exempted *all* employees of automobile dealerships from the FLSA's overtime pay provision. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)) (exempting "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles"); *see also* Br. in Opp'n 1–3. Five years later, however, Congress amended the automobile dealership exemption so

that it would apply only to a specific subset of dealership employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles " Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836. Congress again amended the exemption in 1974, but not in ways that are directly relevant here. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65. Through this process of legislative tinkering, Congress carefully calibrated—and recalibrated—the scope of the automobile dealership exemption. In such a scenario, it is fanciful to think that loading the dice in favor of a particular interpretation—by narrowly construing the exemption against employers—is the best way to honor Congress's intent. Rather, courts should deploy the ordinary tools of statutory construction to determine the exemption's intended meaning.

2. The argument that FLSA exemptions should be narrowly construed is animated by a desire to protect employees' wage and hour rights. *See AH Phillips*, 324 U.S. at 493. But this argument is misguided because, in many cases, the FLSA exemptions serve the interests of employees as well as employers. That the Act's exemptions do not inherently trench on employees' rights confirms that the exemptions should be interpreted fairly, not in an unduly narrow manner.

Congress believed that the best way to ensure "a fair day's pay" was to require overtime in *some circumstances*. *Id.* That said, Congress likewise believed (as demonstrated by the inclusion of explicit exemptions), that alternative compensation

arrangements could provide better and fairer pay in *other circumstances*. *See Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1363 (11th Cir. 1997) ("The chief financial officer of a company, for instance, would be less likely to [need statutorily required overtime pay] than a janitor or assembly linesman."). Courts should draw the line between these two sets of circumstances by interpreting the text and purpose of the statutory exemption, not by "laying a judicial thumb on one or the other side of the scales." *Assorted Canards*, *supra* at 582.

Again this case is illustrative. Service advisors are well compensated: They earn an average of more than $65,000 per year, with the top 10% earning an average in excess of $99,000 per year. Br. of *Amici Curiae* Nat'l Auto. Dealers Ass'n *et al.* 6–7 (filed Nov. 4, 2015); *see also id.* at 7 (noting that service advisors in the Pacific region earn considerably more). And Respondents are compensated solely via commissions. *See Navarro*, 780 F.3d at 1270. Thus, to the extent they worked long hours, they did so not "out of desperation," *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), but instead based on an incentive to increase their compensation. "They are, after all, already highly compensated, so it is unlikely that a victory in this lawsuit will improve their net position, and it might worsen it." *Id.* at 1179.

In short, forced overtime would saddle automobile dealerships and service advisors with a compensation model in which service advisors would be limited in the hours they could work and unable to earn extra pay for better performance. Accordingly, while Respondents themselves would obtain a windfall if

they were to prevail in this suit, their narrow construction of the FLSA's automobile dealership exemption would *undermine* rather than promote the interests of service advisors going forward. There is no basis to assume *a priori* that Congress would wish this result, simply because the FLSA might be deemed, in some vague sense, "remedial."

II. THE VALIDITY OF THE CANON THAT FLSA EXEMPTIONS MUST BE NARROWLY CONSTRUED IS SQUARELY ENCOMPASSED WITHIN THE QUESTION PRESENTED, AND THIS COURT SHOULD ADDRESS IT.

The Court might be capable of resolving this case without addressing the validity of the canon that FLSA exemptions must be narrowly construed. That said, the question whether the canon has any legitimacy is squarely presented here, and prudential considerations counsel strongly in favor of addressing this question.

As a threshold matter, addressing the canon's validity would be proper under this Court's Rules. Rule 14(1)(a) dictates that the question presented "is deemed to comprise every subsidiary question fairly included therein." *Id.* Here, the question presented is whether the FLSA's automobile dealership exemption applies to service advisors. And determining the proper standard to be used when interpreting that exemption is an issue that is antecedent to—and "fairly included" within—the question presented. *See id.*; *see also* Pet. 32–33 (discussing the canon in the context of addressing whether service advisors fall within the automobile dealership exemption).

Moreover, although this Court has previously endorsed the canon that FLSA exemptions should be narrowly construed, *e.g.*, *AH Phillips, Inc.*, 324 U.S. at 493, *stare decisis* presents no obstacle to rejecting it now. "[T]his Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001); *see Lingle*, 544 U.S. at 545–46 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied [this] inquiry in *Agins* itself But in no case have we found a compensable taking based on such an inquiry."). *Amici* are not aware of any decision in which this canon was an essential part of the Court's holding. For example, the Court recited the canon in *Mitchell v. Ky. Finance Co.*, 359 U.S. 290 (1959), but it did so only in one line in the last paragraph of the opinion. *Id.* at 295. The Court described its holding in *Mitchell* as supported by "abundant pointed evidence"—including "detailed and explicit" legislative history (at a time when the Court placed great weight on such authority), *id.* at 293, 296, and so any interpretive presumption was irrelevant. The Court in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960), likewise recited the canon in passing, but it did not need to rely on the canon because it found the answer to the interpretive question to be "clear." *Id.* at 393 ("It is clear that respondent does not meet at least two of the three standards "); *id.* at 391 ("clear legislative history"); *id.* at 394 ("clearly"); *id.* at 392.

What is more, in recent years, this Court has twice declined to apply the canon that FLSA exemptions must be narrowly construed. In

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012), the Court concluded that FLSA's "outside salesman" exemption did "not furnish a clear answer" to the question at issue, but the Court nonetheless declined to apply the canon. *Id.* at 2170, 2172 n.21 (reasoning that the canon "is inapposite where [the Court is] interpreting a general definition that applies throughout the FLSA"). In *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014), the Court again chose not to apply the canon. *Id.* at 879 n.7. Indeed, eight Justices joined an opinion that went out of its way to avoid reliance on the canon. *See id.* ("The Court has stated that 'exemptions' in the Fair Labor Standards Act 'are to be narrowly construed against the employers seeking to assert them.' *We need not disapprove that statement to resolve the present case.*") (emphasis added).

Finally, although this Court is not bound by its dicta regarding the narrow construction of FLSA exemptions, lower courts often perceive themselves to be. This perception creates a risk that lower courts will pull up short of the careful analysis needed to decide close cases, defaulting instead to the canon in order to construe an exemption narrowly. For instance, in the decision below, the Ninth Circuit repeatedly invoked the canon that FLSA exemptions should be narrowly construed.[3] Yet the Supreme

[3] *Navarro*, 780 F.3d at 1271 ("we must apply the background rule that 'the FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers"); *id.* ("FLSA exemptions are to be withheld except as to persons plainly and unmistakably within their terms and spirit."); *id.* at 1271 n.3 (discussing "[t]he rule that courts should construe the FLSA's exemptions narrowly"); *id.* at 1272 ("Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 'exemptions are narrowly construed against

Court of Montana reached the opposite conclusion when not relying on the canon. *See Thompson v. J.C. Billion, Inc.*, 294 P.3d 397, 401 (Mont. 2013) (failing to apply the canon, although noting that the lower court did so, and holding that service advisors fall within the FLSA's automobile dealership exemption). Indeed, at least one other court has suggested expressly that the canon was the dispositive factor in its analysis. *Amendola v. Bristol-Myers Squibb Co.* 558 F Supp. 2d 459, 472 (S.D.N.Y. 2008) (distinguishing decisions in factually identical cases because the courts did "not acknowledge that the FLSA's exemptions must be narrowly construed against employers"); *see Miller v. Team Go Figure*, No. 3:13-CV-1509-0, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014) (relying heavily on the canon).

This Court should take the opportunity presented in this case to reject the notion that exemptions to remedial statutes must be narrowly construed, at least as applied to the FLSA.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the Ninth Circuit's decision should be reversed.

(continued...)

employers."); *id.* at 1273 (concluding that the Department of Labor's "interpretation accords with the presumption that the § 213 exemptions should be construed narrowly").

Respectfully submitted,

KATE COMERFORD TODD
WARREN D. POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

DEBORAH WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

MATTHEW W LAMPE
Counsel of Record
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mwlampe@jonesday.com

E. MICHAEL ROSSMAN
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215

RYAN J. WATSON
JONES DAY
51 Louisiana Avenue N.W
Washington, D.C. 20001

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Counsel for Amici Curiae

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No. 15-415

IN THE

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARK D. SCHNEIDER
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
9000 Machinists Place
Upper Marlboro, MD 20772-2667
mschneider@iamaw.org
Telephone: (301) 967-4500

DAVID A. ROSENFELD
Counsel of Record
CAREN P. SENCER
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
Telephone (510) 337-1001

Counsel for Amicus Curiae

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

QUESTIONS PRESENTED

Under *Chevron's* two-step framework:

1. Does the Fair Labor Standards Act's statutory overtime-pay exemption for automobile dealership "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles," 29 U.S.C. § 213(b)(10)(A), unambiguously apply or not apply to service advisors?

2. Is the Department of Labor's 2011 notice-and-comment regulation, 29 C.F.R. § 779.372(c), which concluded that service advisors fall outside the salesman/partsman/mechanic exemption, a permissible construction of the statute?

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESFONDENTS

INTEREST OF *AMICUS CURIAE*

The INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM") is a labor organization of nearly 600,000 members, representing workers across the United States.[1] It represents employees in various industries including manufacturing, aerospace and shipyards. Its particular interest in this case is that it has long represented employees in service departments of automobile dealerships, going back to at least the 1940s. As of this date, the Union represents over 35,000 employees in automotive industries, mainly automobile dealerships, across the country.

The Union's primary representation of employees in automobile dealerships has been service mechanics. Its representation, however, has also included partsmen, service advisors, parts runners, dispatchers, bodymen, lot persons and the many additional classifications who work in the varying configurations in the service departments of different dealers throughout the country.

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[1] No counsel for a party authored this *amicus* brief in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

The Union has been in the forefront of organizing employees in service departments. As a result, through its affiliated District and Local Lodges, the IAM has participated in hundreds of National Labor Relations Board (NLRB) proceedings involving unit determinations concerning mechanics, service advisors and other job classifications in service departments.

The Union's interest in this case is ensuring that service advisors whom it currently represents, as well as those whom it seeks to organize, are not exempt from overtime under the Fair Labor Standards Act, 29 U.S.C. § § 201-219. The IAM is also concerned that any expanded reading of the exemption would affect the many other classifications of employees it represents in service departments. The narrow application of the overtime exemption in 29 U.S.C. § 213(b)(10)(A) is particularly important to this long-term goal of organizing and representation.

Amicus Curiae brings a specific perspective to this Court. Rather than present argument about the meaning of the Fair Labor Standards Act, we detail and explain how the National Labor Relations Board (NLRB), in representation proceedings, has treated service advisors, mechanics and the other members of service departments in various dealerships over the last seventy-five years of reported decisions. While these decisions do not deal with the precise issue before the Court, they provide an even-handed view of the work performed in service departments, how that work is divided amongst classifications, the layout of dealerships, the wages and methods of compensation for various classifications and, of particular interest, the work of service advisors. This

review should assist the Court in understanding the nature of service advisor work and why it makes sense that they are not within the exemption from overtime of the Fair Labor Standards Act (FLSA) that is at issue.

I. STATEMENT OF THE CASE

Respondents brought an action under the Fair Labor Standards Act, claiming that they were entitled to overtime under federal law. The district court dismissed their claim, and the Ninth Circuit reversed, holding that the exemption in the Fair Labor Standards Act did not apply to service advisors in automobile dealerships. This decision relied, in part, on an interpretation of the Department of Labor.

This case is before the Court without any factual record of what service advisors do in dealerships across the country. The record is limited to the bare allegations of the complaint concerning one dealership.

Under the provisions of the National Labor Relations Act, 29 U.S.C. § 151, the NLRB is authorized to determine appropriate bargaining units for the purposes of collective bargaining. *See* 29 U.S.C. § 159(b).

In making these unit determinations, the NLRB has issued numerous decisions describing the job duties and working conditions of service advisors and other classifications employed in the service departments of automobile dealers. We present analysis from these decisions in support of the Respondents' arguments that the exemption cannot reasonably apply to service advisors and that the Department of Labor's regulation excluding service advisors from the

exemption makes sense both historically as well as within the current configuration of automobile dealerships. *See* 29 C.F.R. § 779.372(c)(1).

II. SUMMARY OF ARGUMENT

Decisions of the NLRB and Decisions and Directions of Elections of Regional Directors, present a thorough review of job duties and working conditions of employees in automobile dealerships. Because the NLRB is required by statute to make individualized unit determinations each time a question of representation is raised, there is an extensive administrative record examining the operations in automotive service departments from the 1940s to present.

These cases fully explore the job duties of service advisors. The work of service advisors is regularly described as the communication link between customers and the mechanics who service their vehicles. Service advisors are uniformly described as having neither the skills nor tools to perform the servicing function. This undermines the argument of Petitioner that service advisors are engaged in the servicing of vehicles. Pet. Br. 22-35.

Review of NLRB decisions from the 1960s forward show service advisors work in dealerships performing non-mechanic work, managing the process of automobile repair for customers and ensuring that customers are advised of the status of needed repairs and costs associated with the repairs, and all paperwork is completed properly. This undermines the argument of Petitioner that service advisors are salesmen. Pet. Br. 23.

These same decisions describe, in detail, the numerous job classifications in use in service departments and the scope of the job duties associated with these classifications. Lube technicians, lot attendants, car washers, detailers, cashiers, warranty clerks, parts drivers, parts runners, body shop employees and many other job classifications are used in addition to mechanics and partsmen in most dealerships. These job classifications, and the scope of associated duties, do not fit within the FLSA exemption at issue, and these individuals currently enjoy the overtime protections of the FLSA. This undermines the argument of Petitioner that the exemption is meant to be inclusive of all classifications of the parts and service departments engaged in the servicing of vehicles. *See* Pet. Br. 29-31, 36-38 and 39-40.

Given the scope of job classifications used in dealerships in the 1960s, which continues to the present, it is clear that the exemption was not intended to include service advisors. If accepted, the Petitioner's argument regarding the functional integration of service advisors in the servicing of vehicles would result in a *de facto* return to the blanket exemption of 1961 since all employees in the service department are, in some way, part of the servicing process. Contrary to the Petitioner's position, it would be more disruptive to expand the exemption to include more classifications.

Our argument outlines the framework used by the NLRB, the job duties regularly assigned to service advisors, the duties of other employees in service departments and explains why the Department of Labor's

limited reading of the FLSA exemption is consistent with the daily operations of automobile dealerships.

III. ARGUMENT

A. THE NATIONAL LABOR RELATIONS BOARD IS TASKED WITH DETERMINING THE APPROPRIATE BARGAINING UNIT FOR PURPOSES OF COLLECTIVE BARGAINING.

Through the NLRB representation process, a wealth of administrative decisions have been issued outlining the job titles, job duties, working conditions and supervisory structures of automotive dealerships. These decisions provide a neutral factual review of dealerships over time.

Under the provisions of 29 U.S.C. § 159(b), the NLRB "shall decide in each case whether, in order to assure the employees the fullest freedom in exercising their rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof. "

The procedure by which these unit determinations are made is also established in the statute. "[T]he Board shall investigate such [representation] petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c).

Although the National Labor Relations Act sets out certain restrictions on determinations of appropriate

bargaining units, the NLRB has historically employed a community of interest standard in determining the appropriateness of any particular unit.

The leading treatise describes the Board's function as follows:

> The Board draws upon the criterion of community of interest in order to determine whether, for example, employees with special craft skills and training should be separated out for purposes of voting and bargaining or whether they should be grouped along with semi-skilled and unskilled employees in an "industrial" unit; whether "production and maintenance" employees should be grouped in a single unit with "white-collar employees" doing technical or clerical work; whether the unit should include only employees working in a single plant, store or office of the employer or whether there should be a grouping of employees in several—or indeed all—of the employer's plants, stores or offices; and whether it is sound to go even beyond the employees of a single employer and to group those employees with persons employed by other employers in the same industry in the same competitive market. In making judgments about "community of interest" in these different settings, the Board will look at such factors as: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6)

> geographical proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis And Advocacy* § 5.2, at 103 (2013).[2] *See also NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); NLRB, *An Outline of Law and Procedure in Representation Cases* 135-38 (2012).[3]

As a result of consistent application of this established test, nearly all unit determination decisions review the work of the employees in each job classification, the methods of compensation, integration of work, interchange between classifications, hours of work, required uniforms, and other criteria that fall into the traditional multi-factor test.

Prior to 1961, the hearings used to gather the information necessary to make unit determinations were conducted by the Regional Director, and then the record was submitted directly to the Board in Washington for the issuance of a decision. After 1961, the decisions were issued by the Regional Directors subject to review by the Board. The process has been modified recently to speed up and simplify the process but still

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[2] This is the third edition of the text previously known as Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* (2d ed. 2004).

[3] Available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/representation_case_outline_of_law_4-16-13.pdf

requires a determination to be made in each case based on its unique facts. 79 Fed. Reg. 74,308 (December 15, 2014) (codified at 29 C.F.R. pts. 101, 102, and 103).

The Board has thus, through its Regional Directors and decisions of the Board on review, considered the placement of service advisors in or out of potential bargaining units sought by unions as part of the representation process. These cases provide a body of concrete facts regarding the work of service advisors and other service department employees. The similarities and differences between service advisors and other employees and the general working conditions of service departments have been described in a manner that should offer some stability and accuracy to an understanding of the work of service advisors.

The records relied on below are the Regional Director decisions and, in some cases, Board decisions involving service advisors and service departments in general.[4] In a few cases, these issues arise in the context of unfair labor practice proceedings involv-

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[4] Before 1961, there are no Regional Director decisions. All cases before May 15, 1961, are decisions of the Board because all hearing records were submitted directly to the Board, which then issued a decision after review of the record. In 1961, the Board delegated the power to hold hearings and issue decisions to the Regional Directors. 29 U.S.C. § 153(b); 26 Fed. Reg. 3885 and 3911 (1961). Thereafter, Regional Directors issued decisions subject to the right of any party to seek review. If review was granted, the Board would then issue a decision. Thus, this brief cites Board decisions before 1961 and primarily Regional Director decisions after 1961. Unless otherwise indicated, those Regional Director decisions were not challenged by way of exceptions to the Board, test of certification, or otherwise. *See* 29 C.F.R. § 102.60-72.

ing service advisors and other members of service departments. These cases are resolved by decisions issued by Administrative Law Judges, which are then reviewed directly by the NLRB. *See* 29 U.S.C. § 160.[5]

In some cases, the Board's determinations as to the appropriateness of a unit have been reviewed by the courts of appeals where employers challenged the bargaining unit in what is called a test of certification. *See* Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis And Advocacy* § 4.10, at 90-92 (2013). This Court has granted particularly wide discretion to the Board's determination of the appropriate bargaining unit. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *NLRB v. Hearst Publ'ns Inc.*, 322 U.S. 111 (1944).

As will be evident from these cases, employers and unions, primarily the International Association of Machinists, have litigated the scope of bargaining units in service departments because service departments contain many different classifications and vary from dealership to dealership. In some cases, the petitioning union has sought to include service advisors in a unit of service department employees with mechanics. In other cases, the union sought to exclude service advisors. In other cases, the employer has

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[5] We cite to cases that are available on the NLRB's website. The Regional Director decisions after 1961 were not published in the official volumes of NLRB Decisions. Regional Director's Decisions and Directions of Election are available through the Board's website at https://www.nlrb.gov/search/cases. Reported NLRB Decisions are available on the Board's website at https://www.nlrb.gov/cases-decisions/board-decisions in addition to Westlaw and Lexis.

sought to include the service advisors when the union has resisted it, or the employer sought to exclude them when the Union has sought to include them. Regardless of which party has taken which position, the result is a decision analyzing the job duties, compensation methods and daily operations in the particular service department.

The variety of positions taken by the parties to these unit determination proceedings makes these decisions helpful and trustworthy to the issue before this Court. In effect, they constitute a neutral record of service department operations and should be treated as an accurate historic description of the work of service departments in general and service advisors in particular. These conclusions are generalized from well over one hundred cases that concern various classifications in dealerships that differ significantly in size, organization and operations.

B. THE FUNCTION OF SERVICE ADVISORS IS CUSTOMER RELATIONS.

1. The Primary Function of Service Advisors is a Communication Link.

A service advisor is a customer service position. The primary duties are to record customer concerns regarding their vehicle on a repair order, to provide an estimate and to keep customers informed on the status of their vehicle's repair or maintenance.

Service advisors:

greet in-coming customers, prepare repair orders, and assign the repair orders to individual [mechan-

> ics] Service advisors are required to have good communication skills and receive special training in dealing with customers The 'advisor' part of their title deals with their relationship with the customer. They do not 'advise' or counsel the mechanics on how to diagnose a problem, what cause to eliminate first, or other technical aspects they merely serve as the link between customers and mechanic.

McRobert Motor Co. d/b/a Gresham Ford, 36-RC-6082, at p. 2 (July 25, 2001). The primary responsibility of a service advisor is "to greet customers, to find out what problems the customers are experiencing with their vehicles, and to keep the customers informed about the status of their vehicles during the repair process." *Phil Long European Imports, LLC*, 27-RC-8071, p. 5 (August 24, 2000).

The service advisor position is also described as "a liaison" between the customer and the mechanic. *Autonation Imports of Longwood, Inc. d/b/a Courtesy Honda* ("*Courtesy Honda*"), 12-RC-083701, p. 5 (August 10, 2012); *Performance of Brentwood LP*, 26-RC-063405, p. 24 (September 29, 2011); *Crown Motor Co., Inc., d/b/a Acura of Memphis* ("*Acura of Memphis*"), 26-RC-8613, p. 15 (August 20, 2010). As such, it is not surprising that "customer service is a critical aspect of the service advisor job." *Big Valley Ford, Inc.*, 32-RC-5370, p. 7 (October 14, 2005). The job requires "customer-facing skills" to explain repairs that will be performed to the vehicle. *BMW of West Springfield*, 1-RC-21908, p. 4 (May 24, 2005).

The duties of the service advisor are generally to generate the necessary paperwork for a repair to start,

commonly referred to as a "repair order," and to ascertain the estimated time and cost to complete a repair. *Arbogast Buick, Pontiac, GMC Truck, Inc.*, 9-RC-17854, p. 3 (November 21, 2003). A mechanic diagnoses any problems with a vehicle and conducts a multi-point inspection in the hope of generating additional potential repairs. *Performance of Brentwood*, 26-RC-063405, p. 24. Based on the findings of the mechanic (and not the service advisor), the service advisor contacts the customer and recommends additional repairs. *Big Valley Ford*, 32-RC-5370, pp. 12-13. The customer either accepts or rejects the proposed additional repairs, and either way, the appropriate repair order is generated by the service advisor and provided to the mechanic. *Courtesy Honda*, 12-RC-083701, pp. 7-8. Once the repair is completed, the service advisor contacts the customer to advise that the vehicle is ready for pick-up. *Id.*, p. 8. The completed repair order is then used to compute the billing, and a copy is provided to the customer for her records.

This is generally seen, in modern dealerships, as a customer relations function. *Bradley Chevrolet, Inc.*, 25-RC-10146, p. 4 (November 6, 2002). Even earlier, in 1950, some took the position that service advisors were essentially "clerical workers." *Fuller Auto. Co. d/b/a Fuller Auto. Co. & Fuller Mfg. & Supply Co.* ("*Fuller Auto. Co.*"), 88 N.L.R.B. 1452, 1457 (1950).

2. Service Advisors Do Not Sell or Service Automobiles.

The scope of a service advisor's duties does not include mechanic work or automobile sales. Employers have regularly argued to the NLRB that the

only appropriate bargaining unit is the entirety of the service department because "employees are integrally related to the single function of servicing and repairing automobiles." *Fletcher Jones Las Vegas d/b/a Fletcher Jones Chevrolet* ("*Fletcher Jones Chevrolet*"), 300 N.L.R.B. 875, 876 (1990); *Countryway P'ship d/b/a Crown Motors* ("*Crown Motors*"), 14-RC-12430, pp.1-2 (November 12, 2003) (employer argues that all employees in service, body shop, parts and detail departments are all part of the "vehicle repair process"); *Rush Truck Ctrs. of Cal., Inc. d/b/a Rush Truck Ctr., Sylmar*, 31-RC-8102, p. 9 (April 26, 2002). This is parallel to the gloss Petitioner raises in the pending case. Pet. Br. 23. The NLRB regularly rejects this argument and finds distinct units within the service department. Similarly, this Court should reject adding an additional classification of employee to the 29 U.S.C. § 213(b)(10)(A) exemptions.

As found in many decisions, "advisors do not perform vehicle maintenance and repairs." *Courtesy Honda*, 12-RC-083701, p. 36. Service advisors are not qualified to perform servicing work. *Phil Long European Imports*, 27-RC-8071, p. 5. And, "ability to perform repair or mechanical work" is not a job requirement for service advisors. *Sexton Ford Sales, Inc.*, 14-RC-068800, p. 7 (December 8, 2011).

The service advisor is responsible for securing consent from a customer that a recommended additional repair should be performed. This is sometimes referred to as "up-selling." *See Contemporary Cars, Inc., d/b/a Mercedes-Benz of Orlando* ("*Mercedes-Benz of Orlando*"), 12-RC-9344, p. 17 (November 14,

2008) *subsequent decisions* 354 N.R.L.B. No. 72 (2009) and 355 N.L.R.B. 592 (2010), *enforced*, 667 F.3d 1364 (11th Cir. 2012). In some states, like California, a dealership contacts a customer to provide an estimate of costs and receive explicit authorization for a repair before performing any work beyond that which was stated on the original repair order. This is required by statute. *See* Cal. Bus. & Prof. Code § 9884.9.

In most dealerships, service advisors perform no mechanic work. However, in some dealerships, a service advisor may perform minor service work, like testing a vehicle's battery, replacing a wiper blade or changing a license plate bulb as a courtesy to a customer. *Acura of Memphis*, 26-RC-8613, pp. 15-16; *N. Bay Saturn Group, Inc. d/b/a Saturn of Marin* ("*Saturn of Marin*"), 20-RC-17537, p. 5 (July 30, 1999). To the extent a service advisor performs minor mechanical work it "is incidental to their primary duties of greeting customers and preparing the R[epair] O[rder]." *Sexton Ford Sales*, 14-RC-068800, p. 14; *Courtesy Honda*, 12-RC-083701, p. 27. A service advisor would not have the tools or skills to perform more than this incidental work. Further, this time is neither tracked by the dealership nor charged to the customer. *Sexton Ford Sales*, 14-RC-068800, p. 7; *State College Ford Lincoln Mercury, Inc.*, 6-RC-12215, p. 7 (June 11, 2003).

Just as the job duties of service advisors do not include servicing or maintaining vehicles, the duties similarly do not include selling either service or vehicles. The primary function of the job is to serve as the communication link between mechanics and customers. *Howard Orloff Imports, Inc.*, 13-RC-21069, p. 2 (November 10, 2003). Although there is undoubtedly

a sales component, no reported cases describing the job duties of service advisors designate sales as the primary responsibility of the position. In addition, the sales portion of the function has limited discretion. The service advisor does not diagnose a vehicle. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. The service advisor records the customer concerns as a guide to the mechanic, who diagnoses the problem to determine precisely what work is needed and/or suggests repairs or maintenance. The information necessary to make these suggestions comes from two sources: repairs identified by the mechanic or manufacturer provided maintenance menus or service schedules, such as service menus for specified mileages. *Courtesy Honda*, 12-RC-083701, p. 15; *Thomas Motors of Joliet, Inc.*, 13-RC-21966, p. 2 (September 10, 2010); *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, pp. 9-10 (January 9, 2008). As a result, the service advisor serves a reporting function conveying to the customer the diagnosis of the mechanic or the recommendation of the manufacturer.

Although many service advisors are paid on a draw against commission system, the pay plan itself is not determinative since individuals in many classifications in a dealership receive a portion of compensation based on either individual, department or dealership-wide performance. This includes not only mechanics, partsmen and salesmen but also, on occasion, includes dispatchers, detailers, parts drivers, warranty clerks, and bookers.[6] *See Mercedes-Benz of Pembroke Pines*,

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[6] The duties associated with these positions are addressed below.

12-RC-9290, p. 11 (bookers paid on commission); *Tinley Park J. Imports, Inc.*, 13-RC-21270, p. 6 (November 24, 2004) (detailers responsible for recondition the appearance of vehicles paid on flat rate); *Howard Orloff Imports*, 13-RC-21069, p. 4 (dispatchers paid by commission); *Jackson Ford, Inc.*, 7-RC-22545, pp. 5-6 (November 17, 2003) (lube technicians may receive commission); *Champion Fordland, Inc.*, 4-RC-20177, p. 4 (May 8, 2001) (warranty clerk earns salary and commissions); *Michael Stead, Inc. d/b/a Michael Stead's Walnut Creek Ford* ("*Michael Stead's Walnut Creek Ford*"), 32-RC-4789, p. 3 (August 11, 2000) (parts driver and clerical participate in bonus program based on department-wide sales).

Similarly, some of the classifications that are usually thought to be paid on productivity based systems or as a percentage of sales, may be paid hourly. *See, e.g., Sexton Ford Sales*, 14-RC-068800, p. 9 (some body shop repairmen paid hourly, those with higher skill levels paid flat rate); *Wiers Int'l Trucks*, 25-RC-10389, p. 5 (May 21, 2007) *subsequent decision* 353 N.L.R.B. 475 (2008) (service technicians, service advisors and parts associates all paid on an hourly basis); *Michael Stead's Walnut Creek Ford*, 32-RC-4789, p. 3 (service advisors paid hourly with ability to participate in department-wide bonus program).

Additionally, many dealerships have an internal service advisor who only writes repair orders on new cars (the pre-delivery inspection process) or used cars that are being readied for sale. *See, e.g., Thomas Motors of Joliet*, 13-RC-21966, p. 3; *Keldeneri Corp. d/b/a San Leandro Nissan Hyundai Kia*, JD(SF)-10-07 (April 5, 2007). They do not have

contact with any external customers and do not "sell" as the sole "customer" is the dealership itself. *Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. Similarly, if the dealership has an express oil change process, there may be a service advisor assigned only to that part of the operation. *Big Valley Ford*, 32-RC-5370, p. 3. In some cases, the internal service advisor and express lane service advisors may be paid hourly as compared to on a commission basis. *Azure Auto II, LLC d/b/a Findlay N. Volkswagen* ("*Findlay N. Volkswagen*"), 28-RC-160737, p. 3 (October 9, 2015).

C. DEALERSHIPS IN THE 1960s EMPLOYED MANY POSITIONS IN THE SERVICE AREA BEYOND THE TWO SPECIFIED EXEMPT POSITIONS.

The term "service advisor" is not new to the automotive services lexicon. Although the title "service salesman" had been used in the 1940s and 1950s, usage of that term reduced dramatically by the 1960s and is rarely, if ever, used in dealerships, as reflected in more recent current case law. When Congress was debating the scope of the FLSA exemption, service advisor was a known service department position.

The history and practice of job title usage in NLRB cases supports the position that if Congress intended to include individuals performing the work of service writers or advisors into the scope of the overtime exemption, the language would have included the classification. Dealerships in the 1960s used multiple job titles when referring to their service department employees, and the job title of service writer/advisor

was already in wide-spread use. *See Trevellyan Oldsmobile Co.*, 133 N.L.R.B. 1272 (1961).

For example, in 1965, the Board found the titles of "service writer, line mechanics, new car get ready and new car detail mechanics, used-car mechanics, body-and-fender men, painters and helpers, parts department men, and lubrication, pickup, and delivery men" each to be in use in a single dealership. *See W. R. Shadoff*, 154 N.L.R.B. 992, 993 (1965). Similarly, in 1962, the job titles of service writer, dispatcher, automotive line mechanics, porters, paint and body shop mechanics, new car get-ready, used car make-ready, and parts department were in use. *See Austin Ford, Inc.*, 136 N.L.R.B. 1398, 1399-1400 (1962).

As demonstrated above, through the 1960s, more than just mechanics and partsmen "servicing and repairing customers' automobiles" were working in service departments, and similarly, more than just salesmen were "preparing cars for sale to the public" in either service or sales departments. *See W. R. Shadoff*, 154 N.L.R.B. at 994. The Petitioner's argument that these broad functions define the scope of the FLSA exemption should be rejected. Pet. Br. 28-31. To accept the position would be a return to the 1961 blanket exemption.

The historical use of a variety of job classifications is recorded more than a decade before the 1961 exemption was enacted. In *Fuller Automobile Co.*, 88 N.L.R.B. at 1453, job titles of control clerk, new and used car and truck salesmen, parts panel salesmen, office clerical employees, body shop employees, foremen, service writers, watchman, swing man and

car jockeys were identified as part of the sales and servicing organization.

As the description above shows, the use of multiple classifications, above and beyond those specified in the FLSA exemption, is not limited to the service area. In new car sales, a dealership may employ finance and insurance salesmen in addition to automobile salesmen. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 410 (1982) (excluding finance and insurance salesmen from unit of automobile salesmen), *review denied on other grounds, Auto. Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *Larry Faul Oldsmobile Co., Inc.*, 262 N.L.R.B. 370 (1982) (finance and insurance salesmen who are in new car, used car and lease departments included in unit of automobile salesmen); *see also Cutter Dodge, Inc.*, 278 N.L.R.B. 572, 575 (1986) (excluding outside parts salesmen).

The same analysis can be applied outside of automobile dealerships. Reported cases related to farm implement dealerships are scarce although there are cases dealing with farm implement manufacturers who also sold their implements. In one of the few farm implement dealership cases, the Board had an opportunity to determine the appropriate bargaining unit at a company that was engaged in the "retail sale, service and repair of farm machinery and farm implements." *Missco, Inc.*, 116 N.L.R.B. 1213 (1956). In that case, the only job titles sought by the union were "mechanics, helpers, assemblers, parts employees, truckdrivers, painters, and janitors." *Id.* at 1214. The employer sought to add the bookkeeper and salesmen. *Id.* There were no service advisors, presum-

ably because the position is not necessary at a facility repairing farm implements.

D. EVERY SERVICE DEPARTMENT INCLUDES MANY NON-EXEMPT CLASSIFICATIONS OF EMPLOYEES.

A modern auto dealership's service and parts department includes many classifications beyond those specifically listed in 29 U.S.C. § 213(b)(10)(A). A review shows the regular usage of at least twenty job titles or functions in a well-staffed service department. Other than mechanics and partsmen, each is outside the FLSA exemption. Dealerships often have other departments, such as lease departments, fleet sales and used car departments, that encompass additional non-exempt classifications.

Dealerships have varying structures of management. There may be a service department head (now often called fixed operations) and various department heads, including in the parts department or even among the service advisors. *See Hall Chevrolet, LLC*, 5-RC-126386 pp. 2-3 (May 22, 2014); *Mercedes-Benz of Orlando*, 12-RC-9344, p. 3; *Clay Chevrolet, Inc.*, 1-RC-21570, p. 2 (December 20, 2002). In general, a service department may be divided into sub-departments: for example, automotive servicing, parts, and body shop. *See Big Valley Ford*, 32-RC-5370, p. 3; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 2. A fourth sub-department of "new car get-ready" may also be designated. *See Austin Ford, Inc.*, 136 N.L.R.B. at 1399. Some dealerships have service, sales, parts and body shop departments, each with their own supervisor. *Fairfield Ford*, 9-RC-

17713, p. 2 (October 29, 2002) *subsequent decision* 340 N.L.R.B. No. 9 (2003) *review denied, enforced,* 116 Fed.Appx. 601 (6th Cir. 2004).

As a result of these various organizational structures, it is difficult to apply a "one size fits all" approach to the variety of ways in which a dealership may be organized or job duties divided.

1. Additional Classifications of Service Department Employees

A service department requires a multitude of jobs to be performed for a customer to have a positive experience and a vehicle to be repaired efficiently. Most of these jobs are unskilled and well outside the scope of any FLSA exemption.

The most common classification inside the service department is a mechanic, frequently referred to as a service technician. *Phil Long European Imports*, 27-RC-8071, p. 3, n. 3. The mechanic is responsible for vehicle repair and maintenance. This is a skilled position, and, under Board law, the mechanics on their own may form a craft unit, distinct from other dealership employees based on their skill and training. *Courtesy Honda*, 12-RC-083701, pp. 25-26. However, over time, the skills and function of mechanics have changed. Now, most parts are replaced rather than repaired. *Clay Chevrolet, Inc.*, 1-RC-21570, p. 3. Also, based on the increase in electronic components in vehicles, one of the most frequently used "tools" for a mechanic is a diagnostic computer. *Courtesy Honda*, 12-RC-083701, p. 11. Mechanics usually have their own tools and tool boxes. The value of these tools and box can exceed $50,000. *Jackson Ford*, 7-RC-22545, p. 4; *Oliver C. Joseph, Inc.*, 14-

RC-12830, p. 8 (August 12, 2011). Mechanics earn certifications from either the manufacturer or the National Institute for Automotive Service Excellence (ASE). *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 875; *Performance of Brentwood*, 26-RC-063405, p. 10; *Big Valley Ford*, 32-RC-5370, p. 6; *Saturn of Marin*, 20-RC-17537, p. 4. No one else in the dealership does the work of the mechanic, and the mechanic does not do the work of any other classification. *Fairfield Ford*, 9-RC-17713, p. 3. This makes sense because of the skill sets involved and the higher wages of mechanics.

In addition to highly-trained mechanics, there are likely to be lesser skilled technicians known as lubricators, lube technicians, express techs, or lube and oil technicians. These individuals do not bring their own tools to work. Their work is frequently limited to oil and other fluid changes, changing belts or filters, rotating tires or other simple servicing work. *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 876; *Courtesy Honda*, 12-RC-083701, p. 14; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 3. Lube technicians are generally paid on an hourly basis and are not exempt from overtime. *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 876; *Junction Buick Pontiac GMC-Truck*, 8-RC-16059, p. 4 (June 30, 2000). These employees are often employed in "quick lane" or "quick service" areas, geographically separate from the rest of the service department. *Academy LLC d/b/a Phil Long Ford of Chapel Hills* ("*Phil Long Ford of Chapel Hills*"), 27-RC-8320, p. 4 (May 21, 2004).

There may also be pre-delivery inspection technicians who do not perform mechanical work but simply inspect and prepare new vehicles for customers to

pick up. *Royal Gate Dodge, Inc.*, 14-RC-12420, pp. 6-7 (February 24, 2003). This includes inspecting the vehicle upon its arrival, removing any protective coatings used in shipping, placing floor mats in vehicles, installing dealer logo license plate holders and the like. This position is sometimes referred to as a "get ready technician" or "new car cleanup employee." *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 876; *Dick Bullis, Inc. d/b/a Dick Bullis Chevrolet* ("*Dick Bullis Chevrolet*"), 176 N.L.R.B. 158, 158 (1969); *Performance of Brentwood*, 26-RC-063405, p. 23; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4. In some dealerships, this function is filled by an "internal technician" who performs pre-delivery inspections on new cars and used cars acquired by the dealership. *Acura of Memphis*, 26-RC-8613, p. 13.

The pre-delivery inspection work may also be performed by a "detailer." *Tinley Park J. Imports*, 13-RC-21270, p. 6. But a detailer may also refer to an individual who provides a deep clean and wash to a vehicle and repairs minor paint scratches for either existing customers or in preparation for selling a pre-owned vehicle. *Performance of Brentwood*, 26-RC-063405, p. 19; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 14; *Saturn of Marin*, 20-RC-17537, p. 4. Detailers are paid on an hourly basis. *Oliver C. Joseph*, 14-RC-12830, p. 12; *Saturn of Marin*, 20-RC-17537, p. 7 There may also be a car washer or wash rack employee who washes cars that have been serviced before the vehicle is returned to the customer. *Sexton Ford Sales*, 14-RC-068800, p. 8.

Some dealerships will have a dispatcher who keeps track of the work and assigns the work to the me-

chanics depending on the nature of the work and the skills of the mechanics. *Fairfield Ford*, 9-RC-17713, p. 4. In older parlance, they were known as "towermen," inherited from other settings where some sat in a tower to monitor the flow of work. *See Dick Bullis Chevrolet*, 176 N.L.R.B. at 158. Other dealerships may call this position a "workflow coordinator." *Performance of Brentwood*, 26-RC-063405, p. 26. This individual may have no mechanical certifications but may earn commission off of the total labor sold in the service department. *Sexton Ford Sales*, 14-RC-068800, p. 8. In some dealerships, the service advisors may serve this function. *Sacramento Auto. Ass'n, Valley Motor Car Dealers Council*, 193 N.L.R.B. 745, 746 (1971); *Q&S Auto., LLC*, 32-RC-5403, p. 10 (March 3, 2006).

A dealership may also employ a quality control person. This person reviews repaired vehicles to ensure the work was performed correctly. He does not usually perform his own repair work and may have limited mechanical knowledge. *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 875. This individual can be paid hourly and receive overtime. *Life Quality Motor Sales, Inc.*, 29-RC-9173, pp. 26-28 (February 23, 1999).

Some dealerships employ an appointment taker, also known as a service appointment coordinator or scheduler. *Courtesy Honda*, 12-RC-083701, p. 17; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 5; *Life Quality Motor Sales*, 29-RC-9173, p. 11. Like the name suggests, an appointment taker schedules service appointments for customers calling the service department. This is mainly a clerical function. It is paid on an hourly basis and entitled to overtime

compensation. *Life Quality Motor Sales*, 29-RC-9173, p. 12.

A service department may have clerks and cashiers. The cashiers accept payment from customers and may file documents and/or pick up phones for the service department. *Phil Long European Imports*, 27-RC-8071, p. 2, n. 2; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4. Clerks process paperwork associated with repairs. Some clerks are warranty clerks, which means they administer warranty payments from manufacturers. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4. This may also be referred to as a warranty administrator. *Courtesy Honda*, 12-RC-083701, p. 2. Both clerks and cashiers are generally hourly, non-exempt positions but occasionally are salaried. *Acura of Memphis*, 26-RC-8613, pp. 17-18 (hourly); *Crown Motors*, 14-RC-12430, p. 6 (same); *Life Quality Motor Sales*, 29-RC-9173, pp. 29-31 (cashiers and warranty clerks both hourly, non-exempt); *but see Fairfield Ford*, 9-RC-17713, p. 3 (salaried).

There may be a "booker" who "books" or closes repair orders and ensures that technicians are properly paid under the flat rate pay system. *See Mercedes-Benz of Orlando*, 12-RC-9344, pp. 7, 20. This job may be referred to as a "flagger" in reference to the flat rate hours "flagged" by a mechanic. *Sexton Ford Sales*, 14-RC-068800, p. 8. There may even be a file clerk responsible for the retention of paperwork. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4; *Life Quality Motor Sales*, 29-RC-9173, p. 32.

There are also porters, lot porters, valets, or car jockeys. *Pflueger Auto Group, LLC*, 37-RC-4120, p.

7 (November 21, 2005); *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 3. Their main function is to move vehicles either from the customer service entrance of the dealership to a mechanic's stall or a lot, or from the lot to a stall or back to the customer. These employees also help to maintain cleanliness in the service area. *Phil Long Ford of Chapel Hills*, 27-RC-8320, p. 10. A porter may also top off fluids, such as windshield wiper fluid or antifreeze. *Courtesy Honda*, 12-RC-083701, p. 6. They are paid on an hourly basis and are eligible for overtime. *BMW of West Springfield*, 1-RC-21908, p. 7; *Junction Buick Pontiac GMC-Truck*, 8-RC-16059, 4. A car may also be moved by a car cleaner or washer to facilitate the cleaning of the car. Regardless of the scope of these utility people, this is generally an hourly, non-exempt position. *Acura of Memphis*, 26-RC-8613, p. 17; *Life Quality Motor Sales*, 29-RC-9173, pp. 10-11.

The dealership may also employ a "shuttle driver" or "courtesy driver" who is responsible for transporting customers to and from the facility. *Courtesy Honda*, 12-RC-083701, p. 2; *see Mercedes-Benz of Orlando*, 12-RC-9344, p. 22. This is an hourly position. *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, p. 11. In a large dealership, there may also be a service greeter who directs customers to the appropriate service advisor. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 5.

Although mechanics are generally required to keep their own work areas clean, most dealerships either employ janitorial staff or contract with an outside agency to provide on-going cleaning services. If em-

ployed directly by the dealership, the janitor is usually housed within the service department even if her duties extend into the sales areas. *See Country Ford Trucks, Inc.*, 32-RC-4617, p. 3 (June 16, 1999) *subsequent decision* 330 N.L.R.B. 328 (1999), *review denied*, 229 F.3d 1184 (D.C. Cir. 2000). This job is hourly and non-exempt. In some dealerships, the individual performing this work may be called a maintenance employee, and the job may also include facilities or machinery maintenance. *Frank Buck Motors d/b/a Pocono Peterbilt* ("*Frank Buck Motors*"), 4-RD-2121, p. 4 (November 13, 2007).

2. Classifications in the Parts Department

The service department may or may not include the parts department. The modern parts department is generally staffed by partsmen. The partsman may be called a retail or wholesale parts counter employee or a parts advisor. *Courtesy Honda*, 12-RC-083701, p. 2; *Phil Long European Imports*, 27-RC-8071, p. 7. A partsman generally works at one of two counters: the back counter, which opens to the shop where the mechanics work or the front counter, which opens into the dealership to an area where customers may purchase accessories or parts that will not be installed by the dealership. *Michael Stead's Walnut Creek Ford*, 32 RC-4789, pp. 2-3. These individuals take parts orders from mechanics, members of the public or outside companies (including body shops and independent repair shops) and provide the parts to the requesting party. *Courtesy Honda*, 12-RC-083701, p. 20. In dealerships that maintain a body shop, there may be a third counter specific to the parts necessary for the body shop. *Hall Chevrolet*,

5-RC-126386, p. 14. Historically, partsmen may have had mechanical responsibilities in repairing parts, but recent unit determination decisions do not reference any mechanical tasks associated with the job. *Compare Austin Ford*, 136 N.L.R.B. at 1400 *with Courtesy Honda*, 12-RC-083701, pp. 19-20.

In a large parts department, there are other employees in addition to traditional partsmen. The stocker, stockroom clerk, or shipping and receiving employee, confirms receipt of ordered parts, stores incoming parts and re-packages used parts for recycling, return to the manufacturer or other disposal. *See Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4; *Michael Stead's Walnut Creek Ford*, 32-RC-4789, pp. 2-3. In some dealerships, the shipping and receiving clerk is required to operate a forklift for the storage of parts. *Courtesy Honda*, 12-RC-083701, p. 20. These individuals may also be called warehouse employees. *Frank Buck Motors*, 4-RD-2121, p. 5. This is generally an hourly paid position. *Pflueger Auto Group*, 37-RC-4120, p. 11; *Life Quality Motor Sales*, 29-RC-9173, p. 8.

A parts delivery driver is used when a part is not in stock at the dealership. The parts driver may pick up a needed part from an offsite warehouse maintained by the employer, another dealership or a parts retailer. Similarly, the driver may deliver parts to another dealer or repair shop. *Courtesy Honda*, 12-RC-083701, p. 21. This is an hourly position. *Sexton Ford Sales*, 14-RC-068800, p. 11; *Pfleuger Auto Group*, 37-RC-4120, p. 11.

Some dealerships employ a parts runner who delivers parts inside the shop from the partsman to the me-

chanic. In some dealerships, this individual is the "parts inventory control associate." *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 7. This is an hourly position. *See Findlay N. Volkswagen*, 28-RC-160737, p. 3.

Some dealerships employ an administrative assistant, cashier or clerical dedicated to the parts department. *See, e.g., Michael Stead's Walnut Creek Ford*, 32-RC-4789, p. 3. Alternatively, there may be a parts warranty clerk. *Payton-Wright Ford, Inc.*, 16-RC-10539, p. 7 (November 24, 2003). The parts driver, runner, clerk and administrative assistant are hourly, non-exempt positions. *Michael Stead's Walnut Creek Ford*, 32-RC-4789, p. 3.

3. Classifications in the Body Shop

Some dealerships maintain a body shop as part of the service department. A body shop, generally in a separate area, is used for painting, frame adjustment, and cosmetic repairs. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 6. This may also be referred to as a collision center. *Payton-Wright Ford*, 16-RC-10539, p. 1. Employees of the body shop repair vehicles but do not service vehicles within the terms of the FLSA exemption. Some of the job titles are parallel to the traditional service department, but the function is different.

A body shop technician will do collision and paint repair work. They straighten metal, utilize body filler and grinders to repair damage, smooth and sand repaired areas, and match paint. These employees may be paid on a flat rate basis or receive hourly pay. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 6 (flat rate pay); *Life Quality Motor Sales*, 29-RC-9173,

p. 6 (hourly pay). This is a different skill set and craft from the automotive mechanic. *Big Valley Ford*, 32-RC-5370, p. 13.

The body shop may include an automotive painter to re-paint those sections of the vehicle that have been repaired. This work can be performed in a paint booth and completed with a spray gun. *Sexton Ford Sales*, 14-RC-068800, p. 10. This individual may also repair sheet metal and match paint. This position may be paid based on revenue produced. *Id.*; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 7 It could also be paid as an hourly wage with an incentive for work produced. *Royal Gate Dodge*, 14-RC-12420, p. 10. The painter may have an hourly paid assistant. *Sexton Ford Sales*, 14-RC-068800, p. 11.

The body shop may employ a detailer who cleans, washes, waxes and buffs cars but does not perform body work. *Life Quality Motor Sales, Inc.*, 29-RC-9173, p. 7. This detailer would be separate from the service department detailer or car washer. *Bradley Chevrolet*, 25-RC-10146, pp. 5, 6.

Body shops have an "estimator" who performs some of the functions of a service advisor. *Payton-Wright Ford*, 16-RC-10539, p. 3. The estimator provides an estimate on the cost of body repair and the expected date of the return of the car to a customer. *Hall Chevrolet*, 5-RC-126386, p. 12. Frequently, these estimates are prepared for insurance companies. *Royal Gate Dodge*, 14-RC-12420, p. 9. There is no sales function in preparing estimates.

There may be a separate porter and secretary designated for the body shop department. *Crown Mo-*

tors, 14-RC-12430, p. 6. Both of these are hourly positions. *Id.* at p. 7

E. THE DIVERSITY OF JOB FUNCTIONS IN A DEALERSHIP SUPPORTS A LIMITED AND NARROW READING OF THE OVERTIME EXEMPTION.

Dealerships vary dramatically, and the roles of mechanics and partsmen are some of the few constants. Because of the diversity of functions of other classifications employed in a dealership, the exemption should be read as written, including only the specified classifications of mechanics and partsmen. Any other approach would exclude many classifications from the FLSA protections they now enjoy.

The justification provided for partsmen and mechanics to be exempted from the FLSA overtime requirements stem from a potential for on-call work to be performed at the site of a disabled vehicle including trucks and farm implements. *See* Resp. Br. 32-35. This is particularly true in the legislative history connected to partsmen and their role in maintaining farm implements. *Id.* Putting aside changes in the automotive, truck and farm implement industries and the question of whether the rationale for the exemption still holds true, the rationale never was applied and would not hold true for service advisors, lube technicians, warranty clerks, lot porters, detailers, parts stockmen, parts runners, bodymen, painters or any other employee in a service department. Nonetheless, the Petitioner argues that service advisors be read into the statute based on either their functional integration in the servicing of vehicles or their work

selling the servicing of vehicles. Pet. Br. 25, 27 Many of the above classifications would be swept into the exemption by adopting that rationale.

Contrary to the Petitioner's suggestion, designating service advisors as exempt is not necessary to maintain simplicity in pay plans for the service department. Service departments already have a multitude of pay plans to address the various categories of employees. Mechanics and body shop technicians can be paid on varying flat rate plans, but a different flat rate plan applies to the service shop than the body shop. Some employees, including parts runners, warranty clerks and dispatchers may receive a bonus based on department-wide sales. Some warranty clerks receive a monthly salary. Some bonuses are based on customer satisfaction in addition to gross or net sales of parts, labor or both.

These complex pay systems are managed electronically and are frequently outsourced to payroll companies such as ADP and PeopleSoft. Regardless of the exemption status of service advisors, a typical dealership will continue to employ a multitude of exempt and non-exempt employees in the service department. *See UAG-Steven Creek II, Inc. d/b/a Audi Stevens Creek*, 32-RC-108320, p. 4 (July 29, 2013) (service department employs service technicians, service advisors, greeter/porters, dispatcher, warranty clerk, car washer/detailers, and shuttle drivers); *Courtesy Honda*, 12-RC-083701, pp. 1-2 (parts and service department includes service technicians, lube technicians, service advisors, appointment taker, cashier, service porter, warranty administrator, service support individual, retail parts counter employee, wholesale parts

counter employee, parts shipping and receiving employee, parts floater employee and parts driver); *Payton-Wright Ford*, 16-RC-10539, p. 1 (body shop, parts and service department includes service technicians, quick lube technicians, service advisors, body or collision center technicians, parts back counter employees, stocker, warranty parts employee, parts driver, parts warranty clerk, bookers, aftermarket sales, parts front counter employees).

Petitioner's legal position expands the three exemptions into many disparate classifications. An estimator serves as the functional equivalent of a service advisor in the body shop. The estimator serves as the go-between for the customer (or the insurance company) with the body shop technician. The estimator neither works on the vehicle itself nor does the position have an explicit sales component: there is usually no work to "up-sell." Either the dent or damage is going to be fixed or not. If the service advisor is read into the exemption, does the estimator get shoehorned into the exemption as well based on the similarities to service advisors?

A lube technician has neither the earning potential of the mechanic (as she is generally paid hourly without a production bonus) nor the skill set that would result in being required to perform work away from the dealership. A broad reading of the exemption would encompass this lower skilled position which, while engaged in service on vehicles, is not a true "mechanic."

A warranty clerk may earn a portion of his compensation based on overall sales of service. The clerk does not service vehicles nor does he have direct

communication with the customer to sell additional service. A bonus is calculated on the total warranty work that is ultimately approved by the manufacturer. In that sense, he is selling the service that has been performed to the manufacturer. No rational reading of the exemption, however, should include the warranty clerk.

Similarly, the term "partsman" is applicable only to the parts advisor/parts counter person. To expand the exemption to include the parts warehouseman, parts driver or parts runner, or parts cashier/clerk strays from the original meaning of the language. The legislative history shows that partsmen were included in response to concerns regarding maintenance of farm implements, where a part may have to be fabricated for a quick repair. Resp. Br. 36-37. It would be exceedingly rare for a partsman in an automobile or truck dealership and repair facility to encounter a similar circumstance. It is unheard of for a parts warehouseman to be dragged out of bed to find a part in a department that is open for set hours during the day. Nonetheless, if all persons integral to the servicing of an automobile were covered under the exemption, the parts warehouseman would lose the benefit of the overtime to which he is currently entitled.

A dispatcher is essentially a middleman between the service advisor and the mechanic, determining which available mechanic is best suited to perform a particular repair. If the service advisor is included in the exemption and the mechanic is included in the exemption, the dispatcher, as the functionally integrated link between advisor and mechanic, would be

similarly included notwithstanding the dispatcher's lack of work servicing a vehicle or selling services to customers.

In some dealerships, an individual may hold multiple positions. For example, at the Ford dealership in State College, Pennsylvania, one employee was found to spend 25% of her time as a service advisor, 50% of her time performing quality checks and the remaining 25% of her time processing warranty claims. *State College Ford Lincoln Mercury*, 6-RC-12215, pp. 7-8. Unlike the remaining service advisors at the dealership, who were paid salary with a bonus based on parts sold, she was paid hourly for her service advisor work and only earned a bonus based on the number of satisfied customers to whom she spoke. *Id.* Under the Petitioner's analysis, this individual would be excluded from the FLSA protection of overtime based on her service advisor work.

These examples highlight the slippery slope of expanding the limited language of 29 U.S.C. § 213(b)(10)(A) to include job titles beyond salesman, partsman and mechanic. Given the variations in structure and job duties between dealerships found in all of these NLRB cases, a narrow reading is required. The Department of Labor has the mandate, expertise and knowledge to review job duties in a broad number of dealerships. Rather than the Court relying on one isolated workplace, the DOL, which is better suited for the task, should be setting policy on this matter and its interpretation should be honored.

IV. CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

MARK D. SCHNEIDER
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
9000 Machinists Place
Upper Marlboro, MD 20772-2667
mschneider@iamaw.org
Telephone: (301) 967-4500

DAVID A. ROSENFELD
Counsel of Record
CAREN P. SENCER
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
Telephone (510) 337-1001

Counsel for Amicus Curiae

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Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

MICHAEL F. STURLEY
LYNN E. BLAIS
727 East Dean Keeton Street
Austin, Texas 78705

ERIN GLENN BUSBY
411 Highland Street
Houston, Texas 77009

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who regularly teach and write about employment and labor law.[2] *Amici* have no stake in the outcome of this case other than their scholarly interest in the logical and rational development of the law. Because the proper interpretation of the Fair Labor Standards Act of 1938 ("FLSA") implicates fundamental issues of employment and labor law, *amici* believe that their perspective may assist the Court in resolving this case.

I. THE FLSA APPLIES BROADLY TO ACHIEVE FAR-REACHING AND FAR-SIGHTED OBJECTIVES

Congress enacted the FLSA in 1938 to implement employee protections that were expansive and revolutionary. As this Court has noted, "[t]he Act declared its purposes in bold and sweeping terms," *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950), acting "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *id.* at 510. To achieve those expansive purposes, the FLSA established a national minimum wage, forbade the use of child labor, established maximum hours that workers could work each week, and mandated overtime pay for time worked in excess of the maximum hours. Fair Labor Standards Act of 1938,

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[1] The parties have consented to the filing of this brief, and letters expressing their blanket consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

ch. 676, §§ 6, 7, 12, 52 Stat. 1060, 1062-64, 1067; *see* 29 U.S.C. §§ 206, 207, 212.

Congress intended the FLSA's protections to apply to a broad array of American workers. *See United States v. Darby*, 312 U.S. 100, 109 (1941) (the FLSA "set up a comprehensive legislative scheme"); *Powell*, 339 U.S. at 516 ("Breadth of coverage was vital to [the FLSA's] mission. Its scope was stated in terms of substantial universality "). Because breadth of coverage was foundational to the Act's purposes, exceptions to coverage "were narrow and specific." *Powell*, 339 U.S. at 517 Indeed, President Franklin D. Roosevelt deemed the FLSA "the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country," "[e]xcept perhaps for the Social Security Act." 1938 PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 392 (Samuel I. Rosenman ed., 1941).

Moreover, even the original "far-reaching, far-sighted" FLSA was merely a starting point. *See id.*; S. Rep. No. 75-884, at 3 (1937) ("These rudimentary standards will of necessity at the start fall far short of the ideal."). In subsequent years, Congress picked up President Roosevelt's mantel by expanding the Act's coverage to advance its broad objectives. *See* H.R. Rep. No. 89-871, at 9 (1965) (stating that, "despite the Act's broad coverage terms and the courts' liberal interpretations regarding coverage and restrictive interpretations regarding exemptions," there was "great need for extending the present coverage of the Act to large groups of workers"). In particular, Congress extended the FLSA's reach in 1966 by expanding the scope of coverage under the Act and narrowing the categories of workers excluded from its safeguards. *See* Fair Labor Standards

Amendments of 1966, Pub. L. No. 89-601, §§ 101-215, 80 Stat. 830, 830-38 (codified at 29 U.S.C. §§ 203, 213); H.R. Rep. No. 89-871, at 9-11, 13, 17; S. Rep. No. 89-1487, at 4-6 (1966). Congress amended the definition of "enterprise" so that more businesses were included, and it lowered (and, in some cases, eliminated) the annual sales threshold for coverage. *See* Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607, 625 (1972). At the same time, Congress modified a number of exemptions to further expand coverage under the Act. *See id.* "The net result [of the 1966 Amendments] is an extension of the Act's coverage to over eight million additional employees." *Id.* Congress subsequently has amended the FLSA several times, expanding its coverage so that today it applies to more than 130 million American workers. *See* Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)* (revised July 2009), http://www.dol.gov/whd/regs/compliance/whdfs14.pdf.

To ensure that the FLSA was implemented as broadly as its purposes and goals required, Congress established expansive record-keeping requirements for employers. *See* 29 U.S.C. § 211. In particular, the FLSA states that "[e]very employer subject to any provisions of this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." *Id.* § 211(c).

II. THE FLSA'S BROAD PROTECTIONS EXTEND TO ALL COVERED EMPLOYEES UNLESS THEY ARE EXPLICITLY EXEMPT, AND THE AMOUNT OF PAY IS NOT RELEVANT UNLESS EXPLICITLY INCLUDED IN A STATUTORY EXEMPTION

By design, the FLSA applies broadly to virtually all employees — including commissioned employees and salespersons — unless they are expressly exempted. The scope of the FLSA's overtime protection is broadly crafted, *see* 29 U.S.C. § 207(a)(1), and the exemptions to this broad coverage are "narrow and specific." *Powell*, 339 U.S. at 516. This Court has stated that "[s]uch specificity in stating exemptions [to the FLSA] strengthens the implication that employees not thus exempted remain within the Act." *Id.* at 517. *Cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012). Thus, petitioner's suggestion (at 38-40) that the amorphous "structure and broader purposes" of the FLSA indicate that service advisors[3] were not intended to be covered by the Act is unavailing.

A. Commissioned Employees And Salespersons Are Exempt From The FLSA Overtime Rules Only When They Fall Within Explicit Exemptions

When Congress intended to exempt commissioned employees and salespersons from coverage under the

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[3] Respondents are employees who meet and greet customers at automobile dealers, listen to and evaluate their complaints about their vehicles' operations, evaluate their service or repair needs, and write up estimates for requested service. This job is variously referred to as service advisor, service manager, or service salesman. Throughout this brief we will refer to the job as service advisor.

FLSA, it did so expressly. For example, Section 7(i) of the FLSA creates an exemption from the Act's general overtime pay coverage for certain retail and service establishments with employees who work on commission. *See* 29 U.S.C. § 207(i). Under Section 7(i), employers do not violate the overtime provisions if they employ an employee in a retail or service establishment in excess of the maximum hours so long as:

> (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 and (2) more than half [the employee's] compensation for a representative period (not less than one month) represents commissions on goods or services.

Id. Similarly, Section 13 exempts certain salespeople from the FLSA's general overtime pay provision. *See* 29 U.S.C. § 213(a)(1), (b)(10)(A)-(B). Section 13(a)(1) exempts "any employee employed in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary)." *Id.* § 213(a)(1).[4] Section 13(b)(10)(B) exempts "any salesman primarily engaged in selling

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[4] An "outside salesman" has been further defined as an employee "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing [his or her] primary duty," 29 C.F.R. § 541.500(a)(2), and whose primary duty is either (i) making "sale[s], exchange[s], contract[s] to sell, consignment[s] for sale, shipment[s] for sale, or other disposition[s]," 29 U.S.C. § 203(k), or (ii) "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer," 29 C.F.R. § 541.500(a)(1). If an employee is paid on commission but is not an "outside salesman," they are not exempted from the FLSA's minimum wage provision by this provision.

trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." *Id.* § 213(b)(10)(B). Section 13(b)(10)(A) exempts only "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." *Id.* § 213(b)(10)(A). Unless this provision can be interpreted as expressly exempting service advisors, they do not become exempt employees based on petitioner's unsubstantiated assertions concerning the "structure and broader purposes" of the Act.

The history of Section 13(b)(10)(A) confirms that it cannot be interpreted as an express exemption for service advisors. Prior to the 1966 Amendments, all employees of automobile dealers were exempted from the FLSA overtime provisions. *See* 29 U.S.C. § 213(a)(19) (1964). But in 1966, Congress narrowed this exemption to apply to "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Importantly, this exemption is narrower than other provisions proposed and rejected by Congress during the 1966 amendment process. For example, one amendment proposed in 1965 would have exempted "*any salesman or mechanic* employed by an establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements to the ultimate purchaser." *See* H.R. Rep. No. 89-871, at 67; H.R. 10518, 89th Cong. § 209 (1965) (emphasis added). Thus, Congress considered language that would have somewhat narrowed the automobile dealers exemption while still exempting service advisors — who would fall within the category of "any salesman" — but Congress ultimately rejected

that formulation. Congress instead adopted language that exempts only certain salesmen employed by automobile dealers — namely, those who are primarily engaged in selling automobiles.

B. An Employee's Annual Income Is Irrelevant In Deciding Whether The Employee Is Exempt From The FLSA's Overtime Provision Unless The Statute Or Regulations Expressly Provide Otherwise

Congress expressly defined the scope of some exemptions from the FLSA's overtime provisions in part by the amount that a worker is paid. *See, e.g.*, 29 U.S.C. §§ 207(i)(1), 213(b)(24). A worker's pay level is also relevant under some of the Department of Labor's regulations. *See, e.g.*, 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1). But in the absence of such an express provision, the amount a worker is paid is irrelevant when deciding whether the FLSA's overtime provisions apply. As this Court has explained, "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945).

In suggesting that relatively well-paid workers are not entitled to the statutory protection of the FLSA, petitioner errs (at 40) in focusing on only one of the FLSA's core concerns. To be sure, the FLSA sought to protect workers from inadequate wages — but that was accomplished primarily through the minimum wage provisions. *See, e.g.*, 29 U.S.C. § 206. The overtime provisions were intended to create an incentive for employers to hire more employees, each of whom would work fewer hours, rather than to hire fewer employees working longer hours. *See Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944)

("[T]he Congressional purpose in enacting Section 7(a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement, and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.") (citation omitted).[5] An employee's pay level is irrelevant to that goal.

This Court has long recognized that "an intended effect [of the FLSA] was to require extra pay for overtime worked by those covered by the act even though their hourly wages exceeded the statutory minimum. [The Act] calls for 150% of the regular, not the minimum wage." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577 (1942), *superseded on other grounds by statute as stated in Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985); *see also Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 93 (1942) (emphasizing that a drilling crew on an oil rig was entitled to overtime compensation despite earning far above the minimum wage). An employee "unless specifically exempted [is] entitled to whatever benefits the overtime provisions confer[]." *Missel*,

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[5] *See also* Ronald G. Ehrenberg & Paul L. Schumann, *The Overtime Pay Provisions of the Fair Labor Standards Act*, *in* THE ECONOMICS OF LEGAL MINIMUM WAGES 266 (Simon Rottenberg ed., 1981) ("[T]hroughout the early 1930s bills were repeatedly introduced into Congress to limit the length of the workweek. While the goal of protecting existing employees from the ills associated with excessive fatigue remained, a second explicit purpose of such legislation was to increase employment by distributing the available work."); Robert D. Lipman et al, *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 359-60 (1994) ("Congress believed that requiring employers to pay an overtime premium whenever an employee worked over forty hours in a workweek would motivate employers to hire additional workers rather than pay the overtime penalty.").

316 U.S. at 575. Unless an employee's earnings are part of the definition of an exemption, therefore, they have no bearing on the entitlement to overtime compensation under the FLSA.

The regulations reinforce that principle. For example, 29 C.F.R. § 541.3(a) provides a non-exhaustive list of blue-collar and service workers who "are entitled to minimum wage and overtime premium pay under the [FLSA], and are not exempt under the regulations in this part no matter how highly paid they might be." Those employees are entitled to overtime pay not because of low earnings, but because they worked a high number of hours. Service advisors are in the same position. They are entitled to overtime pay because of how many hours they have worked, not because of how little they are paid. Their pay is simply irrelevant to the exemption claimed.[6]

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[6] This is the case even if the employee earns more than the advisors at issue in this case. For example, in *Gorey v. Manheim Services Corp.*, 788 F Supp. 2d 200 (S.D.N.Y. 2011), commissioned employees of an automobile auction house were held to be covered by the FLSA overtime provisions, even though some of them made $77,000 per year without overtime — which is more than the $75,769 average that petitioner suggests (at 40) is too high to justify FLSA overtime pay. *See* 788 F. Supp. 2d at 204, 206-09 (holding that employees at issue did not qualify for either outside salesman or administrative exemptions to overtime rules).

III. THE FLSA'S BROAD OVERTIME PROVISIONS ROUTINELY COVER EMPLOYEES WHO RECEIVE COMMISSIONS, AND SUCH COVERAGE DOES NOT PLACE AN UNDUE BURDEN ON EMPLOYERS

Congress expressly exempted some narrowly defined categories of employees from the FLSA's overtime provisions. A few of those categories include commissioned employees. It is therefore a simple task to cite — as petitioner does (at 38) — isolated examples of "individuals who are engaged in sales or paid on a commission basis" who are also exempt from the FLSA's overtime provisions. But it would be a fallacy to conclude that the express exemption of some commissioned employees justifies a broader exemption of commissioned employees generally.

Petitioner errs in suggesting that employees who satisfy the precise requirements of Section 7(i) or 13(a)(1) of the FLSA are exempt because "the broader scheme of the FLSA" is to exempt commissioned employees or because it is "reasonable for salespeople to be compensated based on their success at selling." Pet. Br. 38 (emphasis omitted). Rather, Congress made an explicit policy decision to exempt precisely those employees. Congress easily could have exempted all commissioned employees but chose not to do so. On the contrary, commissioned employees — including highly paid employees — routinely have been subject to the FLSA's overtime provisions for many years when they do not fall within an express exemption. Paying overtime wages to commissioned employees has not created practical difficulties for employers that comply with the statute, and following the Department of Labor's long-standing interpretation of Section 13(b)(10)(A) would not impose an unreasonable burden on the industry here.

A. Absent An Express Exemption, Commissioned Employees Routinely Have Been Subject To The FLSA's Overtime Provisions

Employers have recognized that commissioned employees are routinely subject to the FLSA's overtime provisions. For example, the Society for Human Resource Management, which is "the world's largest HR membership organization devoted to human resource management,"[7] recognizes that commissioned employees are generally entitled to overtime pay and explains to its members how to calculate it. *See* Allen Smith, *Bonuses, Commissions Included in Regular Rate of Pay Calculation*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sept. 17, 2012), https://www.shrm.org/legalissues/federalresources/pages/regularrate.aspx. Even the trade publication for automobile dealers recognized not only that commissioned employees generally may be entitled to overtime pay but also that "service advisor[s]" are "not exempt" from the FLSA's overtime provisions. Justin Spath, *Automotive Wage Compliance in the Dealership: Minimum Wage Law Does Apply*, AUTO DEALER TODAY (Dec. 2007), http://www.autodealermonthly.com/channel/dps-office/article/story/2007/12/automotive-wage-compliance-in-the-dealership-minimum-wage-law-does-apply.aspx.

The wide range of reported decisions in which the FLSA's overtime provisions routinely covered commissioned employees illustrates the statute's application to employees who do not fall within an express exemption. For example, when "routemen"

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[7] About the Society for Human Resource Management, https://www.shrm.org/about/pages/default.aspx (last visited Apr. 4, 2016).

who deliver bottled drinks to stores did not satisfy the "outside salesman" exemption of Section 13(a)(1), the workers were entitled to overtime pay even though the employer "paid its routemen a flat fee plus commissions based on volume." *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 382 (6th Cir. 1970).

Similarly, when firework-stand employees did not fall under the Section 13(a)(3) "amusement or recreational establishment" exemption or the Section 13(a)(1) "administrative personnel" exemption, they were entitled to overtime pay even though they were paid on commission. *See Dole v. Mr. W Fireworks, Inc.*, 889 F.2d 543, 545-47 (5th Cir. 1989).

In *Brennan v. Valley Towing Co.*, 515 F.2d 100 (9th Cir. 1975), a towing company's wrecker-drivers who received a commission were still entitled to overtime pay under the FLSA when the employer "failed to establish any exceptions or exemptions taking them out of the Act's coverage." *Id.* at 103-04. *See also, e.g., Hodgson v. Baker*, 544 F.2d 429, 433-34 (9th Cir. 1976) (tow-truck drivers who received commissions were entitled to overtime pay under the FLSA when the Section 13(a)(1) bona fide executive exemption did not apply).

Further examples, from a diverse range of fields, include retail store managers paid a weekly salary and additional performance-based commissions, *see Lalli v. General Nutrition Ctrs., Inc.*, 85 F Supp. 3d 560, 561 (D. Mass. 2015); a delivery man receiving a commission, *see Miranda-Albino v. Ferrero, Inc.*, 455 F. Supp. 2d 66, 77-79 (D.P.R. 2006); gas station operators who received commissions based on the amount of gasoline sold, *see Marshall v. Truman Arnold Distrib. Co.*, 640 F.2d 906, 908-09 (8th Cir.

1981); and yacht salesmen employed to work irregular hours and paid strictly on a commission basis, *see Brennan v. Lauderdale Yacht Basin, Inc.*, 493 F.2d 188, 189 (5th Cir. 1974). Despite the varied industries in which they worked, those employees all had three things in common — they were paid commissions, they did not fall within an explicit FLSA exemption, and they were entitled to overtime pay.

B. Calculating Overtime Pay For Commissioned Employees Is Simple, And Automobile Dealers Are Legally Required To Keep The Records Necessary For Completing The Calculations

The Department of Labor provides clear, straightforward rules to calculate overtime pay for commissioned employees. *See* 29 C.F.R. §§ 778.118-778.122. Those rules apply regardless of whether an employee is paid solely on commission or on a combination of commission and either a salary or hourly wages. *See id.* § 778.117

For a commission-based employee whose commissions are paid weekly, 29 C.F.R. § 778.118 explains the three steps required to calculate overtime pay. First, the employer divides the employee's total weekly earnings (the sum of the employee's salary, hourly wages, and commissions) by the number of hours worked that week. That establishes the employee's regular rate of pay for that week. Second, the employer divides that regular rate by two to determine the overtime rate of pay — the extra compensation the employer owes for each hour in excess of 40 the employee worked that week. Finally, the employer multiplies that overtime rate

by the number of overtime hours worked to calculate the employee's total overtime pay.

A simple example illustrates the process. Suppose a service advisor works 50 hours in a given week and earns $500 (including commissions). To calculate the overtime pay, the dealership follows the three steps:

1. The dealership divides $500 by 50 hours to find the service advisor's regular rate of pay:

   $500 / 50 hrs. = $10/hr.

2. The dealership divides $10/hr. by two to determine the overtime rate of pay:

   $10/hr. / 2 = $5/hr.

3. The dealership multiplies $5/hr. by 10 hours to calculate the total amount of overtime compensation the service advisor has earned:

   $5/hr. * 10 hrs. = $50.

The service advisor is therefore entitled to $50 of overtime pay and should be paid $550 total for that week. The process is repeated each week the service advisor works more than 40 hours. The overtime calculation is not complicated; it involves only three steps, and the calculations are elementary.

The FLSA requires all employers to record the two pieces of information necessary to these calculations — the employee's total weekly hours worked and total weekly wages earned. 29 U.S.C. § 211(c); *see Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 (1953). Specifically, any employer with employees subject to the minimum wage or overtime provisions of the FLSA[8] must maintain and

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[8] Automobile dealers fall within this category because even their employees who are exempt from the Act's overtime provisions are subject to the minimum wage rules. *See* 29 U.S.C. § 206.

preserve records containing "[h]ours worked" each workday and workweek, and the "[t]otal daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation." 29 C.F.R. § 516.2(a)(7)-(8). The Department of Labor has made compliance with those requirements easier by providing the necessary information in an accessible and digestible fact sheet. *See* Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #21: Record Keeping Requirements under the Fair Labor Standards Act (FLSA)* (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs21.pdf.[9]

Employers must record their employees' weekly hours worked and weekly wages earned even if they are excused from complying with § 516.2's other record-keeping requirements on the ground that their employees are exempt from the overtime provisions under Section 13. *See* 29 C.F.R. § 516.12; *see also* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). Even if automobile dealers honestly believed that service advisors fall under the Section 13(b)(10)(A) exemption, therefore, they had no basis for failing to record service advisors' weekly hours worked and

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[9] Employers also have a powerful incentive to comply with their legal obligations. An employer that fails to keep an accurate record of the hours worked by a commissioned employee cannot meet the burden of proof required to establish that the Section 7(i) exemption applies to that employee. *See* 29 C.F.R. § 516.16; Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #20: Employees Paid Commissions By Retail Establishments Who Are Exempt Under Section 7(i) From Overtime Under The FLSA* (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs20.pdf.

wages earned.[10] All automobile dealers are accordingly required to maintain records of the information necessary to compute overtime pay for service advisors.[11] Completing the three simple calculations necessary to compensate service advisors with the overtime pay to which they are entitled would not be burdensome.

IV. INTERPRETING THE FLSA TO COVER SERVICE ADVISORS WILL NEITHER DISRUPT SETTLED EXPECTATIONS NOR IMPOSE UNDUE RETROACTIVE LIABILITY ON EMPLOYERS

The FLSA overtime provisions apply even in the face of "settled industry practices." Petitioner (at 43) and its *amici* are simply wrong to argue that applying the FLSA overtime provisions to service advisors would disrupt settled expectations and open dealers to retroactive liability. Moreover, the Department of Labor regulatory interpretations of Section 13(b)(10)(A) have given employers no basis for establishing expectations that service advisors would be treated as exempt.

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[10] Section 516.12 excuses employers from recording the regular hourly rate of pay for Section 13 exempt employees, but that number readily can be calculated from information that a dealership is required to record, as demonstrated by step one of the overtime pay calculation noted above.

[11] Most courts that have addressed the issue have concluded that the record-keeping burden cannot be shifted to the employees and cannot be delegated or discharged. *See, e.g., Castillo v. Givens*, 704 F.2d 181, 194 (5th Cir. 1983).

A. Longstanding Compensation Practices Do Not Create An Exemption From The FLSA's Overtime Provisions Because Employees Cannot Waive Those Provisions

"[P]reviously agreed upon compensation arrangements" that purport to rely on commissions in lieu of overtime pay do not undermine the validity of respondents' claims under the FLSA. *See* NADA Br. 13. "This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-41 (1981).[12] Accordingly, this Court consistently has held that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945)); *see D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946); *Walling*, 323 U.S. at 42; *Missel*, 316 U.S. at 577.

Nor does petitioner's assertion that those "long-standing compensation arrangements" represent "long-settled industry practices," Pet. Br. 43, diminish the power of respondents' claims to be paid overtime as required under the FLSA. This Court has made clear that "[t]he Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged

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[12] The FLSA permits employers and employees to avoid coverage under the Act in certain enumerated situations, none of which is relevant here. *See* 29 U.S.C. § 207(b), (f), (g).

in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Barrentine*, 450 U.S. at 740-41 (internal quotations omitted; second and third alterations in original).[13] Not even highly paid employees can waive their FLSA protections through contract or private agreement if otherwise not exempt. *See Jewell Ridge Coal*, 325 U.S. at 167 ("[E]mployees are not to be deprived of the benefits of the [FLSA] simply because they are well paid or because they are represented by strong bargaining agents.").

B. The Department Of Labor's Actions Have Not Created Any Settled Expectations That Service Advisors Are Exempt From The FLSA Overtime Provisions

Since 1970, the Department of Labor's formal regulatory interpretations of Section 13(b)(10)(A) consistently have treated service advisors as nonexempt employees under the FLSA. In 1970, the Department adopted an Interpretive Regulation stating that service managers are not exempt employees under Section 13(b)(10)(A). *See* 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). That interpretive regulation was not altered until 2011, when the Department adopted a final rule after notice and comment that reaffirmed its interpretation of Section 13(b)(10)(A) not to provide an exemption for service advisors. *See* Final Rule,

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[13] *See also Brooklyn Sav. Bank*, 324 U.S. at 704 ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.").

Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011).

This case is thus unlike *Christopher v. SmithKline Beecham Corp.*, in which "the industry had little reason to suspect that its longstanding practice of treating [these employees] as exempt transgressed the FLSA." 132 S. Ct. at 2167 To the contrary, automobile dealers have had ample notice for almost five decades that their compensation arrangements with their service advisors are likely unlawful under the FLSA. Industry trade publications demonstrate the widespread understanding within the industry that extant practices did not comply with the FLSA. *See, e.g.*, Justin Spath, *Automotive Wage Compliance in the Dealership: Minimum Wage Law Does Apply*, AUTO DEALER TODAY (Dec. 2007) (noting that "the FLSA specifically describes a group of employees in automotive dealerships that do not qualify for overtime exemptions" and that "'Employees variously described as service writer, service advisor or service salesman are not exempt.' This is probably one of the most common exemption mistakes made in an automotive dealership.") (quoting 29 C.F.R. § 779.372(c)(4) (2007)) (ellipses in original), http://www.autodealermonthly.com/channel/dps-office/article/story/2007/12/automotive-wage-compliance-in-the-dealership-minimum-wage-law-does-apply.aspx.

Neither the 1978 Opinion Letter nor the Department of Labor's 1987 *Field Operations Handbook* justifies petitioner's claim (at 42-43) that enforcing the statute now would unduly upset settled expectations. In 1978, after a few lower courts relied on pre-*Chevron* analysis to reject the Department of Labor's

interpretation of Section 13(b)(10)(A),[14] the Department issued an Opinion Letter stating that "service writers in certain circumstances can be properly regarded as engaged in selling activities." Wage & Hour Opinion Letter WH-467, 1978 WL 51403, at *1 (July 28, 1978). Nine years later, it revised its *Field Operations Handbook* along the same lines. *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* 24L04-4, Insert No. 1757 (Oct. 20, 1987) ("Employees variously described as service writers, service advisors, service managers, or service salesmen have been construed as within the exemption in Sec 13(b)(10)(A) by two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eight and Tenth Circuits). Consequently, [the Wage and Hour Division] will no longer deny the [overtime] exemption for such employees.").

Neither of these documents had the force and effect of law, and thus could not have altered the Department of Labor's 1970 Interpretive Regulation. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("[I]nterpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant

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[14] *See, e.g., Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973) (recognizing that "[t]he intended scope of § 13(b)(10) is not entirely clear" but nonetheless rejecting the Department of Labor's interpretation of the ambiguous statute and substituting the court's interpretation in its place). *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

Chevron-style deference."). Indeed, the Department of Labor makes clear that the *Field Operations Handbook* is not intended to establish interpretive policy or to make any implied or express guarantees to the public, putting the industry on notice of its limited purpose — to advise Department agents of the agency's current enforcement policy. *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook (FOH)* (last updated Aug. 13, 2013) ("The Field Operations Handbook (FOH) is not used as a device for establishing interpretive policy."), http://www.dol.gov/whd/foh/.

In any event, the Department of Labor's 2008 Notice of Proposed Rulemaking ("NPRM") put petitioner and the automobile dealers industry on notice that the application of the Section 13(b)(10)(A) exemption to service advisors was, at best, unsettled. In the NPRM, the Department explained that "[t]he current regulation states that service manager[s] [are] not exempt under section 13(b)(10)(A)" and proposed to change that interpretation to conform to contrary court decisions. Notice of Proposed Rulemaking, Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654, 43,658 (July 28, 2008). In 2011, the Department adopted a final rule reaffirming rather than changing its original 1970 interpretation. *See supra* pp. 18-19. After careful consideration of the comments received in response to the NPRM, the Department concluded that the plain text of the exemption "limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles" and that therefore service advisors were not exempt employees under Section 13(b)(10)(A). 76 Fed. Reg. at 18,838 (internal quotations omitted). Because the NPRM made

clear that service advisors were *not* exempt under current regulation and that the agency was only *considering* changing that regulation, the fact that the final rule did not adopt the proposed change does not undermine the notice provided by the interpretive guidance contained in the 2008 NPRM. *Cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) ("the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such [unfair] surprise unlikely here") (citation omitted).

Finally, the 2011 regulation, promulgated after full notice-and-comment rulemaking, eliminates any plausible claim that petitioner and automobile dealers might have to reliance on settled expectations or concerns about unfair retroactive liability for their actions after the date the regulation became final. The 2011 rule definitively establishes the agency's interpretation of Section 13(b)(10)(A) as not exempting service advisors. That interpretation has the force and effect of law and is entitled to substantial deference from the courts.[15] In light of the binding and definitive effect of the new rule, industry advisors quickly disseminated working papers updating dealerships on the final rule and advising them to revise their pay structures accordingly [16]

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[15] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law.") (internal quotations omitted); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[16] *See, e.g.*, Fisher & Phillips LLP, *The FLSA Overtime Exemption for Service Writers* (Apr. 11, 2011) ("Any dealership that does not already have a possible back-up exemption for their service writers — the so-called 'commission-paid retail'

Contrary to petitioner's claims (at 42-45), applying the 2011 regulation to actions taken after they became final does not impose retroactive liability, create evidentiary difficulties, or provide the covered employees with an unjustified windfall. First, applying a substantive regulation to actions taken after the regulation becomes became final is not retroactive lawmaking. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-18 (1988) (Scalia, J., concurring) (explaining the meaning of primary and secondary retroactivity and making clear that "a rule is a statement that has legal consequences only for the future"). And the Portal-to-Portal Act of 1947 protects against unfair application of the statute to actions taken in good-faith reliance on prior agency interpretive statements. 29 U.S.C. § 259. Second, as noted above, *supra* pp. 14-16, petitioner is obligated by other provisions of the FLSA to maintain all the wage-and-hour records necessary to compute overtime pay for its service managers, so imposing liability for overtime pay for hours worked after the 2011 regulation should impose no evidentiary challenges. Finally, receiving overtime compensation to which they are statutorily entitled can hardly be called a windfall for service advisors. Indeed, the

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employee exemption — should immediately consider taking the steps to claim it"), https://www.laborlawyers.com/the-flsa-overtime-exemption-for-service-writers; Ford & Harrison LLP, *Labor Alert: Department of Labor Reverses Position on Exemption of Service Advisors Working for Automobile Dealerships* (Apr. 7, 2011) ("[I]n order to comply with this new policy, dealerships will have to take into account all earnings for service advisors during the relevant time period including salary plus any commissions to determine the appropriate amount of overtime pay which may be due."), http://www.fordharrison.com/legal-alert-department-of-labor-reverses-position-on-exemption-of-service-advisors-working-for-automobile-dealerships.

fact that petitioner and other automobile dealers have avoided paying statutorily mandated overtime to these employees for almost 50 years is the real unfair windfall in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL F. STURLEY
LYNN E. BLAIS
727 East Dean Keeton Street
Austin, Texas 78705

ERIN GLENN BUSBY
411 Highland Street
Houston, Texas 77009

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

April 6, 2016

APPENDIX

James Brudney teaches Employment Law, Labor Law, and Legislation and Regulation at the Fordham University School of Law. His scholarship is in the areas of workplace law and statutory interpretation. Professor Brudney is co-chair of the Public Review Board for the United Auto Workers International Union and is a member of the Committee of Experts of the International Labor Organization. Following graduation from law school, Professor Brudney clerked for the Honorable Gerhard A. Gesell of the U.S. District Court in Washington, D.C. and then for Justice Harry A Blackmun of the United States Supreme Court. He was associated for four years with the firm of Bredhoff and Kaiser in Washington, and served for six years as Chief Counsel and Staff Director of the U.S. Senate Subcommittee on Labor. Before joining the Fordham faculty, he held an endowed chair at The Ohio State University Moritz College of Law.

Catherine Fisk teaches and writes on the law of the workplace, legal history, civil rights and the legal profession as Chancellor's Professor of Law at UC Irvine. She is the author of dozens of articles and four books. Her research focuses on workers at both the high end and the low end of the wage spectrum. She has written on union organizing among low-wage and immigrant workers as well as on labor issues in the entertainment industry, employee mobility in technology sectors, employer-employee disputes over attribution and ownership of intellectual property, the rights of employees and unions to engage in political activity, and labor law reform.

Julius (Jack) Getman, the Earl E. Sheffield Regents Chair Emeritus at the University of Texas School of Law, is a preeminent scholar in the field of labor law, where he pioneered empirical studies and continues to do extensive field work. He has taught at the Yale Law School, the Stanford Law School, the University of Chicago Law School, and the Georgetown University Law Center. His most recent book, *Restoring the Power of Unions: It Takes a Movement*, was published in 2010 by Yale University Press. He is a former President of the American Association of University Professors.

Brishen Rogers is an Associate Professor of Law at Temple University Beasley School of Law. His scholarship and areas of expertise are in employment and labor Law, corporate law, and torts. Prior to joining the Temple faculty, he was a Climenko Fellow and Lecturer on Law at Harvard Law School. Professor Rogers' scholarship draws on the social sciences and liberal political theory to better understand why and how to regulate labor markets. His current research falls into two streams. The first considers the constitutional and normative dimensions of economic inequality. The second explores how new technologies are both altering the world of work and creating new opportunities for social and political mobilization. Before attending law school, he worked as a community organizer promoting living wage policies.

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In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 WESTPARK DRIVE
MCLEAN, VA 22102
(703) 821-7000

FELICIA R. REID
Counsel of Record
HIRSCHFELD KRAEMER LLP
505 MONTGOMERY STREET
SUITE 1300
SAN FRANCISCO, CA 94111
(415) 835-9000
freid@hkemploymentlaw.com

Counsel for Amici Curiae National and State Automobile Dealers Associations

QUESTION PRESENTED

Whether "service advisors" at car and truck dealerships are exempt from the overtime pay requirements of the Fair Labor Standards Act under 29 U.S.C. § 213(b)(10)(A), which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state automobile dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars, LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such, who have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents franchised new car and truck dealers nationwide. Its members sell new cars and trucks and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. As of February 2016, there were more than 18,000 franchised motor

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, having filed blanket consents with this Court on January 29 and February 1, 2016. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

vehicle dealerships in the United States. Of those, over 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a non-profit trade organization, incorporated in its respective state, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,500 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new cars and trucks and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of immense practical significance to amici and their automobile dealership members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on all franchised new motor vehicle dealers nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have relied in structuring their compensation plans for more than 40 years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's automobile dealerships have relied on the overtime exemption in section 13(b)(10) of Fair Labor Standards Act (FLSA) for "any salesman primarily engaged in selling or servicing automobiles or trucks" in classifying and compensating their Service Advisors.[2] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based primarily on their sales productivity rather than on the number of hours they work. These compensation arrangements benefit both dealerships and employees, and Service Advisors are generally well paid for their contributions to dealership revenues.

The reliance of dealerships on the exemption is justified not only by the statutory language itself, but as important, by a solid wall of judicial authority interpreting the exemption's scope. Until the Ninth Circuit's decision in this case, every federal and state court interpreting the exemption, including several circuit courts of appeals, held that that it encompassed Service Advisors.

The decision of the Ninth Circuit interpreting the section 13(b)(10) exemption to exclude these well

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[2] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Manager, among other titles.

compensated sales employees, if allowed to stand, will disrupt what has until now been a settled and widely accepted compensation practice in the nation's car and truck dealerships.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs one or more Service Advisors. An estimated 45,000 Service Advisors work in dealerships across the United States. They are generally classified as exempt employees, often under section 13(b)(10). If allowed to stand, the decision will create unanticipated liability for past pay practices and windfalls to well compensated sales employees. It will also cause disruption and upheaval to dealerships and employees alike, because it will force dealerships to restructure Service Advisors' incentive-based compensation to avoid that liability going forward.

Amici urge the Court to reverse the decision of the Ninth Circuit and restore this key exemption for the nation's car and truck dealerships.

ARGUMENT

I. Service Advisors Are Key Contributors to the Revenues of Franchised Automobile Dealerships and Have Always Been Classified as Exempt Sales Employees

There are more than 18,000 franchised automobile dealerships in the United States, the great majority of which are represented by amici. Nationally, franchised dealerships employ nearly 1.1 million people and have a combined annual payroll of $60 billion. The overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised automobile dealership in the country has a service department. Service departments provide expert vehicle maintenance and repair services to dealership customers, and are a key revenue and profit center for dealerships. No position is more crucial to the automobile service function than the Service Advisor. Service Advisors evaluate customers' service and repair needs, advise customers about services to address specific problems, provide information about optional and supplemental services, and ensure the customer is satisfied with the service received. In short, Service Advisors are engaged in selling service, maintenance and repairs through the customer relationships they cultivate on a day-to-day basis.

NADA estimates that 45,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2014 the average annual compensation for Service Advisors nationwide was $65,876, with the top 10% earning on average more than $99,164 per year.[3] Compensation levels are significantly higher in NADA's Pacific Region (Alaska, California, Hawaii, Oregon and Washington), where the annual average is $75,769, and the top 10% earn on average $105,583 per year.[4]

Service Advisors are typically classified as exempt from overtime, often under section 13(b)(10) of the FLSA, which exempts "salesmen primarily engaged in selling or servicing automobiles or trucks."[5] The 13(b)(10) exemption requires nothing other than that the employee work in a sales or servicing role at the dealership. It thus provides flexibility in terms of compensation structure and level, including a generous and predictable base wage with the option for incentive pay as an upside to sales productivity.

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[3] National Automobile Dealers Assn. *et al.*, *2015 Industry Report: Dealership Workforce Study* (NADA 2014) (hereafter "*NADA 2015 Workforce Report*") at 13, 84.

[4] *Id.* at 80, 82.

[5] 29 U.S.C. § 213(b)(10).

II. More Than Three Decades of Jurisprudence and Agency Interpretation Confirm That Service Advisors Qualify for the 13(b)(10) Exemption.

Because of the importance of the 13(b)(10) exemption to franchised dealership businesses, over the years, amici have closely tracked judicial decisions and agency guidance addressing the scope of the exemption, and based on that authority, have advised their members on wage and hour compliance obligations with respect to Service Advisors. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[6] and up until the Ninth Circuit's decision in this case, the decisions of federal circuit courts,[7] federal district courts,[8] and state courts[9] have uniformly held that Service Advisors are covered by the exemption. In doing so, these courts rejected the interpretive regulation

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[6] 475 F.2d 1095 (5th Cir. 1973).

[7] *Deel Motors*, 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[8] *Clark & Day v. Palmen Motors*, No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table).

[9] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont. 2013).

issued by the DOL in 1970, which limited the types of sales employee eligible for the exemption to those who sell automobiles and explicitly disqualified Service Advisors from the exemption.[10]

In the face of consistent judicial rejection of its 1970 interpretive regulation, the DOL rescinded that guidance in 1978, issuing an Administrator Opinion squarely holding that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are exempt when the majority of their sales in dollar volume is for non-warranty work.[11] In 1987, the DOL revised its enforcement bible, the Wage & Hour Field Operations Handbook (FOH), to reflect that opinion and to incorporate the judicial authority on which it was based.[12] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" to reflect the judicial interpretation of the exemption. That point came in 2008, when the DOL proposed regulations formally codifying the exemption's judicial interpretation as covering Service Advisors and confirming the agency's acquiescence to it over the previous three decades.[13]

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[10] 29 C.F.R. § 779.372

[11] U.S. Dep't of Labor, Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

[12] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[13] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

III. The DOL's Recent Attempt To Repudiate Judicial Authority and Renege on Its Own Acquiescence to that Authority Has Been Equivocal at Best.

In 2011, the DOL issued a final rule reflecting its current interpretation of the 13(b)(10) exemption, 29 C.F.R. section 779.372. The Final Rule rescinded subsection (c)(4) of the previous regulation, which had explicitly excluded Service Advisors from the exemption, consistent with the DOL's proposed 2008 interpretive regulation. The DOL chose not to revise the remainder of the interpretive regulation in accord with its 2008 proposal, however. It declined to clarify that the exemption encompassed Service Advisors, as it had previously proposed. It also retained the judicially rejected definition limiting exempt salesmen to those who sell vehicles, a definition it had previously proposed to delete. In explanatory remarks, the DOL stated that "there are circumstances under which the requirements for the exemption would not be met" by Service Advisors.[14]

Congress reacted swiftly and definitively to the DOL's about-face. Noting the Final Rule's impact on small businesses and expressing its profound disagreement with the action, Congress attached a limitation rider to appropriations bills for 2012 and 2013 barring the DOL from enforcing its

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[14] 76 Fed. Reg. 18832 (April 5, 2011).

regulatory changes with respect to Service Advisors.[15]

Further seeding the cloud of uncertainty over the import of its recent actions, the DOL has not revised its Field Operations Handbook to exclude Service Advisors from the scope of the exemption, nor has it formally rescinded its 1978 Opinion Letter approving the application of the exemption to Service Advisors.

IV. The Ninth Circuit Decision, if Allowed To Stand, Would Result in Unanticipated Liabilities for the Nation's Automobile Dealerships and Significant Disruption To Service Advisors Themselves.

Based on the consistent judicial interpretation of section 13(b)(10) over the last 40 years, and DOL's acquiescence in it for much of that time, NADA and other amici have advised their members that Service Advisors are encompassed within the FLSA's 13(b)(10) exemption. During that time, automobile dealerships across the country have relied on that advice and authority in classifying Service Advisors as exempt from overtime, and have structured their compensation and recordkeeping practices accordingly. The Ninth Circuit's decision, if allowed to stand, would upend these longstanding

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[15] Consolidated Appropriations Act of 2012, Pub.L. No. 112-74, Div. F § 113, 125 Stat. 786; Joint Resolution, Continuing Appropriations 2013, Pub.L. No. 112-175, 126 Stat. 1313.

understandings and create widespread unanticipated liability and disruption. Its impact in the real world of brick-and-mortar automobile dealerships cannot be overstated.

Without a reversal in this case, dealerships that have relied on the 13(b)(10) exemption in classifying their Service Advisors would face unanticipated liability for past violations, which at the time were not considered violations at all. If the exemption is foreclosed, these dealerships will be subject to private FLSA back pay claims and significant potential liability, given that the national average workweek for Service Advisors is nearly 47 hours.[16] In addition to unpaid overtime liability for seven hours per week going back up to three years, dealerships would face liability for liquidated damages equal to unpaid overtime, interest and attorney's fees.[17]

This specter is very real. Contrary to Respondents' assertions, the FLSA's section 7(i) exemption will be unavailable to a significant portion of the nation's dealerships. That exemption has multiple technical requirements concerning type of business, compensation structure and hourly wage average, each of which must be satisfied.[18] Heretofore, dealerships have had no need to consider

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[16] *NADA 2015 Workforce Report* at 109.

[17] 29 U.S.C. § 216(b).

[18] The 7(i) exemption applies only to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation. 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038, 1044-47 (9th Cir. 2005).

these requirements in structuring their pay and timekeeping practices due to the simplicity of section 13(b)(10), which has no such technical requirements.

The 7(i) exemption, for example, is not available to dealerships that do not qualify as "retail establishments" due to their mix of revenue sources. It will not help dealerships that derive significant revenues from non-retail sales.[19] Moreover, the exemption is not available to dealerships whose compensation plans have been structured to provide more generous base compensation in comparison to commissions. Nor will it be available to dealerships that have not kept time records to ensure their Service Advisors' average hourly compensation meets the 7(i) requirement of exceeding 1.5 times the minimum wage.

Furthermore, an affirmance would also have a significant disruptive impact on employees themselves, as dealerships will be forced to radically restructure previously agreed-upon compensation arrangements to avoid future liability Many will choose to put Service Advisors on an hourly pay plan, paying overtime but lowering or even doing away with commissions, thus eliminating some or all of the upside advantage provided to employees by commission pay for sales productivity. Others, at least those who qualify as retail establishments, may restructure Service Advisor compensation to allocate a greater proportion to commissions in an attempt to meet the 7(i) exemption, thus placing more wages at risk, a disadvantage to employees in lean economic

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[19] *Gieg*, 407 F.3d at 1047-49.

times. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent.

In sum, an affirmance would lead to significant unanticipated liability for dealerships that have relied on the 13(b)(10) exemption, a reliance well justified by consistent, controlling authority. It would also be unduly disruptive to Service Advisors themselves going forward, and indeed is unlikely to benefit Service Advisors in any way.

CONCLUSION

The nation's automobile dealerships have relied on nearly four decades of settled law in structuring their compensation arrangements with Service Advisors. These arrangements reward sales production, not hours worked. An affirmance would upend settled law and result in significant unanticipated liability to dealerships and severe disruption to Service Advisors. Amici curiae respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE
DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
(703) 821-7000

FELICIA R. REID
Counsel for Record
HIRSCHFELD
KRAEMER LLP
505 Montgomery Street
Suite 1300
San Francisco, CA 94111
(415) 835-9000
freid@hkemploymentlaw.com

Attorneys for Amici Curiae National and State Automobile Dealers Associations

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Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TERISA E. CHAW
Counsel of Record
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway, Suite 402
Oakland, CA 94612
(415) 296-7629
tchaw@nelahq.org

JAMIE GOLDEN SYPULSKI
LAW OFFICE OF JAMIE GOLDEN SYPULSKI
150 North Michigan Avenue
Suite 1000
Chicago, IL 60601
(312) 332-6202
jsypulski@sbcglobal.net

Dated April 6, 2016

Additional Counsel Listed On Inside Cover

CATHERINE K. RUCKELSHAUS
NATIONAL EMPLOYMENT
LAW PROJECT
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025 x 306
cruckelshaus@nelp.org

Counsel For Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

under federal employment and labor laws, with a special emphasis on wage and hour rights. Employment rights are virtually meaningless if workers cannot join together in a collective or class action to seek protections, and upholding the procedural rights for workers under these mechanisms is therefore paramount to ensuring those protections. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act (FLSA) and related state laws in most federal circuits and in the United States Supreme Court.

Amici have an abiding interest in the protection of the legal rights of working men and women. Service advisors employed at automobile dealerships do not fall within the Section 213(b)(10)(A) exemption of the FLSA. Accordingly, those advisors are entitled to the protections of the FLSA. *Amici* submit this brief to explain why the decision of the Ninth Circuit Court of Appeals should be affirmed.

SUMMARY OF THE ARGUMENT

Fair Labor Standards Act (FLSA) § 213(b)(10)(A), by its terms, exempts salesmen engaged in the business of selling "automobiles, trucks, or farm implements." The Petitioner concedes that the service advisors who are the Plaintiffs-Respondents in this case do not sell

"automobiles, trucks, or farm implements." The exemption's language is not ambiguous, and plainly does not apply to service advisors. This construction of the statute is supported by the interpretive rules of *expressio unius est exclusio alterius* and *reddendo singula singulis*, and on those grounds alone, the Court can affirm the judgment of the court of appeals. Further, though its application is not necessary to affirm the judgment of the court of appeals, this Court's well-settled, consistently-applied rule of construing exemptions to the FLSA narrowly against the employer, in order to achieve the remedial, humanitarian purposes for which the FLSA was enacted, also supports affirming the judgment of the court of appeals.

ARGUMENT

I. THIS COURT CAN AFFIRM THE COURT OF APPEALS, WITHOUT APPLICATION OF THE FLSA "NARROW CONSTRUCTION" RULE, BY APPLYING OTHER CANONS OF CONSTRUCTION THAT PLAINLY EXCLUDE THE "SERVICE ADVISOR" FROM THE SECTION 213(b)(10)(A) EXEMPTION

Petitioner argues that the unambiguous language of 29 U.S.C. § 213(b)(10)(A) exempts Service Advisors from the overtime requirements of Section 7 Pet.'s Brief at 22–28. While *amici* agree that the language of the exemption is not ambiguous, Petitioner is wrong that the plain

language of the Section 213(b)(10)(A) includes service advisors.

To reach that conclusion, Petitioner engages in some linguistic sleight-of-hand. Petitioner admits that "Service advisors sell services to the dealership's customers." Pet.'s Brief at 23. Petitioner states that service advisors are "dedicated to" the servicing side of the business, and that they are "integral to the process of servicing vehicles." *Id.* Ergo, says Petitioner, service advisors are primarily engaged in servicing vehicles. *Id.* at 23-24.

Assuming Petitioner's predicate statements are true, that service advisors sell services, that they are dedicated to the servicing side of the dealership, and that they are integral to the process of servicing cars: all that given, service advisors are still not servicing vehicles, but only, as Petitioner admits, selling automobile servicing.

Under traditional methods of statutory construction, it is clear that service advisors are not within the ambit of the Section 213(b)(10)(A) exemption.

A. Under The Interpretive Rule Of *Expressio Unius Est Exclusio Alterius*, The Section 213(b)(10)(A) Exemption Is Limited To Three Positions, Salesman, Partsman And Mechanic, And Two Duties, Selling Automobiles Or Servicing Automobiles, But Does Not Include Either "Service Advisor" Or The Duty Of "Selling Servicing"

The rule of statutory construction *expressio unius est exclusio alterius* provides that the express

mention of one thing of a type may excludes others of that type. *United States v. Vonn*, 535 U.S. 55, 64 (2002).

This Court has cautioned, however, that the expression-exclusion rule will not apply where indications are that passage of statutory language was likely not meant to signal exclusion of others of the type. *Id.* Equally damning to the rule is if the enumerated series is characterized as illustrative, rather than exclusive. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002). As well, the canon fails if the enumerated series does not suggest, by a telling absence, the inference that the thing omitted was intentionally left out. *Id.* at 81.

> As we have held repeatedly, the canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

Section 213(b)(10)(A) identifies three positions within a car dealership: salesman, partsman, or mechanic. The Section identifies two functions or duties: selling or servicing automobiles. Both groups are "associated group[s] or series," such that the absence of another in the series, such as "service advisor," or "selling servicing," suggests that the omission was an intentional decision on the part of Congress.

Further, we know that that decision was intentional because of the record of legislative changes to the exemption that occurred in the 1960s.

As the court of appeals noted, in 1961 Congress made exempt *all* employees of car dealerships. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 (9th Cir. 2015). In the next few years, several bills regarding dealership employees were considered, including one that would have exempted only salesmen and mechanics. *Id.* Those failed. After a number of false starts in 1966, including three "final" versions, the present[2] incarnation of the exemption was passed.

Thus, from 1961 to 1966, all dealership employees, including service advisors, were exempt from the FLSA requirements. In those intervening years, numerous different bills were considered by Congress regarding dealership employees, until the passage of the final bill, which included as exempt *only* salesman, partsman, and mechanic, and only if "primarily engaged in selling or servicing automobiles "

The positions and duties identified in the Section 213(b)(10)(A) exemption were the result of much back and forth in Congress, which suggests that Congress was making definitive choices regarding the exempt status of various types of dealership employees; just the opposite of an indication that exclusions were not intentionally made. Furthermore, the positions and functions are exclusive, not illustrative.

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[2] Additional changes were made in 1974 not germane to this case. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, Apr. 8, 1974, 88 Stat. 55, 65.

Accordingly, construction of the Section 213(b)(10)(A) exemption under the expression-exclusion rule reveals both that service advisors are not exempt, and that the duty that service advisors perform, namely selling servicing, is not a function subject to exempt status.

B. Under The Construction Canon Of *Reddendo Singula Singulis*, The Two Duties Of The Section 213(b)(10)(A) Exemption Are To Be Applied To Such Of The Three Positions As Are Related By Context and Applicability

Under the canon of *reddendo singular singulis*, a court can interpret a writing with a number of antecedents and a number of consequents by reference to the context and purpose of the writing as a whole. 2A N. Singer & J.D. Singer, Statutes and Statutory Construction § 47.26, at 438 (7th ed. 2007); *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918).

> [The penalty provisions of the Seaman's Act of 1915] may be distributively applied and such application has many examples in legislation. It is justified by the rule of reddendo singula singulis. By it words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction.

Sandberg, 248 U.S. at 204. *See also Go-Video, Inc. v. Akai Electric Co.*, 885 F.2d 1406 (1989) (under

reddendo singular singulis maxim, a court interprets statutory passage in which antecedents and consequents are ambiguous by reference to context and to purpose of entire act).

Petitioner claims that it is a fundamental grammatical rule that where a series of nouns face a series of gerunds as objects, each noun will link to each gerund. Pet.'s Brief at 24. That is, "as long as that noun-gerund combination has a sensible meaning." *Id.*

To make the exemption work for Petitioner, in order for service advisors to be exempt, they must be "salesmen servicing automobiles." But that noun-gerund combination does *not* have a sensible meaning. Salesmen do not service cars; nor do partsmen or mechanics sell cars. Those combinations are nonsensical: they are, in the words of the court of appeal, the "meowing dog" and "barking cat" of the automobile dealership. 780 F.3d at 1275.

What does make sense is to read Section 213(b)(10)(A) distributively, such that a giving noun takes the appropriate object: salesmen selling automobiles and partsmen and mechanics servicing automobiles.

II. UNDER THIS COURT'S 70–YEAR–OLD PRECEDENT, FLSA EXEMPTIONS ARE NARROWLY CONSTRUED AGAINST THE EMPLOYER, AND UNDER THAT NARROW CONSTRUCTION, SERVICE ADVISORS DO NOT FALL WITHIN THE SECTION 213(b)(10)(A) EXEMPTION

In holding that service advisors are not exempt from overtime, Petitioner claims that the court of

appeals "relied heavily," Pet.'s Brief at 15, on the narrowly-construed canon. To the contrary, the court of appeals does not appear to have relied on it at all.

The court of appeals wrote:

> Examining the statutory text and applying canons of statutory interpretation, we cannot conclude that service advisors such as Plaintiffs are "persons plainly and unmistakably within [the FLSA's] terms and spirit."

Navarro, 780 F.3d at 1271 72 *citing Solis v. Washington,* 656 F.3d 1079, 1083 (9th Cir. 2011) (internal quotation marks omitted). After considering plausible meanings of the word "salesman," the court stated:

> It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 "exemptions are narrowly construed against employers." *Haro,* 745 F.3d at 1256 In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress has not "directly spoken to

> the precise question at issue," *Chevron*, 467 U.S. at 842, the statute is ambiguous.

Id. at 1272. This is not an application of the narrowly-construed canon. If it were, once the court determined that service advisors are *not* "plainly and unmistakably" within the exemption, and since "exemptions are narrowly construed against the employer," then the court should have found service advisors non-exempt, without recourse to U.S Department of Labor (DOL) regulations.

Thus, the canons of statutory interpretation *did* yield a clear answer, because if the interpretive tool of narrowly construing a FLSA exemption against the employer means anything at all, it means not *enlarging* the exemption in any way.

Petitioner claims that service advisors are "unambiguously exempt" from overtime because "service advisors are salesmen primarily engaged in servicing automobiles." Pet.'s Brief at 22.

Whatever else might be said about that statement, there is no question that Petitioner's interpretation calls for an enlargement of the term "servicing automobiles," since Petitioner admits that service advisors do not service cars like mechanics service cars; that is, service advisors do no actual work on the cars. Likewise, Petitioner claims that service advisors are *salesmen*–salesmen that service cars.

A plain English reading of Section 213(b)(10)(A) could not accept such a construction. In fact, service advisors do not service cars; they *sell servicing* to customers. Service advisors sell the services of the mechanic and the partsman to the customer. In any

case, the service advisor is not "servicing" customer cars.

A. The FLSA Is A Remedial Statute Enacted To Eliminate Substandard Wages

After decades of academic research in the early 20th Century,[3] Congress concluded in 1938 that labor conditions detrimental to the minimum necessary standard for the health and well-being of workers were pervasive. 29 U.S.C. § 202(a). To eliminate those conditions, Congress passed the Fair Labor Standards Act. 29 U.S.C. § 202(b).

> The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the

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[3] *See* William G. Whittaker, Congressional Research Service Report for Congress, *The Fair Labor Standards Act: Minimum Wage in the 108th Congress* (2005), Summary.

> orderly and fair marketing of goods in commerce.

29 U.S.C. § 202(a); *Citicorp Industrial Credit, Inc., v. Brock*, 483 U.S. 27, 36 n.8 (1987). This "minimum standard of living" at the heart of congressional concern was emphasized by the Supreme Court six years after the passage of the Act:

> [T]hese provisions, like the other portions of the Fair Labor Standards Act, are *remedial* and *humanitarian* in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.

Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 597 (1944) (emphasis added).[4]

Moreover, improving the plight of workers was not Congress' only concern. 29 U.S.C. § 202(a); *Citicorp Indust.*, 483 U.S. at 36–37. Congress also recognized that goods produced under substandard labor conditions result in unfair competition, and drive down wages and working conditions. *Id.*, at 36 n.8. Aside from their effect, such practices are themselves pernicious and "injurious to the commerce." *United States v. Darby*, 312 U.S. 100, 115 (1941).

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[4] Since 1944, numerous courts have referenced the remedial and humanitarian nature of the Act. *See e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Goldberg v. Wade Lahar Const. Co.*, 290 F.2d 408, 415 (8th Cir. 1961).

Petitioner's *amici* claim that the broad-construction maxim of remedial statutes is flawed because it is based, so they say, on the notion that "Congress intends statutes to extend as far as possible in service of a single objective." Pet.'s Brief at 7

That is a non-sequitur, because construing an exemption narrowly, or requiring that an employer's invocation of an exemption be "plainly and unmistakably" within the exemption's terms, are not conditions that extend the statute "as far as possible." Petitioner's proffered construction of Section 213(b)(10)(A) is a case in point.

Petitioner acknowledges that service advisors sell services. Pet.'s Brief at 23. By some questionable footwork, Petitioner arrives at the conclusion that service advisors are somehow also "servicing automobiles." *Id.* But selling servicing is not the same as servicing, and "selling servicing" is not a job function that places an employee within the ambit of the exemption. *Amici* have argued that other tools of statutory construction yield the conclusion that service advisors are not covered by the exemption. Certainly a narrow construction of Section 213(b)(10)(A) gets to that result, but that is not an "all costs" result, or a position that "extends as far as possible."

B. Section 213 Exemptions Repeatedly And Consistently Have Been Construed Narrowly Against The Employer

This Court's earliest cases holding that the FLSA must be "broadly" or "liberally" interpreted,

and the corollary, that exemptions to the Act be narrowly construed, were prefigured by Justice Frankfurter in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

In *Addison*, citrus fruit cannery employees obtained a judgment on an FLSA claim for unpaid wages. The court of appeals overturned the district court, and the case turned on the definition of "area of production," as that term was used in the Section 13 agricultural exemption of that time. *Id.* at 608–09. The Court reversed the court of appeals and remanded to the district court. Justice Frankfurter wrote:

> The *details with which the exemptions in this Act have been made preclude their enlargement by implication.* While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that *retrospective expansion of meaning* which properly deserves the stigma of judicial legislation." *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

Id. at 618 (emphasis added).

There followed a series of decisions by this Court that made the point more bluntly. *A.H. Phillips*, 324 U.S. at 493 (because the FLSA is a humanitarian and remedial law, any exemption

narrowly construed; any attempt to "extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process"); *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950) (Act exemptions were "narrow and specific."); *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295–96 (1959) ("well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed."); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 (1960) (Section 213 exemptions "narrowly construed" against employer); *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993) ("well-established rule" that exemptions from the Act are narrowly construed).

Most recently, the Court has raised the "narrowly construed" rule twice. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n. 21 (2012) (Court has stated that FLSA exemptions must be narrowly construed against employer and their application limited to those instances "plainly and unmistakably within their terms and spirit"); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (exemptions to the Act are construed narrowly against employer asserting them). In both instances the Court provided the same rationale as to why the rule was not applicable: the "narrowly construed" rule applies to exemptions, and the issues in *Christopher* and *Sandifer* went beyond Section 213. 132 S. Ct. at 2172 n. 21; 134 S. Ct. at 879 n.7

Petitioner's *amici* suggest that this Court has abandoned the narrowly-construed rule, and indeed claim that, after 70 years, that canon of construction was really nothing more than dicta. Chamber of Commerce Brief at 17

But from the earliest days of the Act, and the earliest decisions of this Court on the Act, the narrowly-construed rule has only operated as to exemptions under Section 213. So the rationale provided by this Court for not applying the rule in *Christopher* and *Sandifer* is wholly consistent with the rule's treatment in *A.H. Phillips*, *Mitchell* and *Arnold*.

As to the statement of Petitioner's *amici* that the narrowly-construed canon is dicta, Chamber of Commerce Brief at 17, that is not the characterization that this Court has employed. "*We have held* [Section 213] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold*, 361 U.S. at 394 (emphasis added).[5]

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[5] Nor do the Courts of Appeals treat the FLSA narrowly-construed rule as dicta. *See, e.g., Marzuq v. Cadete Enters.*, 807 F.3d 431, 438 (1st Cir. 2015) (citing cases) (remedial nature of FLSA requires that its exemptions be narrowly construed against those seeking to invoke them); *Chen v. Major League Baseball*, 6 F. Supp. 3d 449, 454 (2d Cir. 2014) (exemptions must be narrowly construed and limited to such establishments "plainly and unmistakably" within exemptions' terms); *Pignataro v. Port Auth.*, 593 F.3d 265, 268 (3d Cir. 2010) (FLSA exemptions narrowly construct against employer); *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 120-21 (4th Cir. 2015) (as remedial act, FLSA exemptions must be narrowly construed against employer, and employer must prove applicability of exemption by clear and convincing evidence); *McGavock v. City of Water Valley*, 452 F.3d 423, 424 (2006) (FLSA construed liberally in favor of employees, and exemptions narrowly against employers seeking to assert them); *Lutz v. Huntington Bancshares, Inc.*, No. 14-3727, 2016 U.S. App. LEXIS 3860, at *9 (6th Cir. Mar. 2, 2016) (exemption narrowly construed

C. If Section 213(b)(10)(A) Is Construed Narrowly, A Service Advisor Is Not Within The Ambit Of The Exemption

After examining the language of the exemption and applying the tools of statutory construction, the court of appeals determined that service advisors were *not* persons "plainly and unmistakably" within the terms of the Section 213(b)(10)(A) exemption.

Had the court been applying the narrow-construction rule, its work would have been completed: the employer was not entitled to invoke the exemption because service advisors were not within its terms.

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against employer); *Johnson v. Hix Wrecker Serv.*, 651 F.3d 658, 660 (7th Cir. 2011) (as a remedial act, FLSA exemptions are narrowly construed against employers); *Fezard v. United Cerebral Palsy of Cent. Ark.*, 809 F.3d 1006, 1010 (8th Cir. 2016) (FLSA exemptions narrowly construed to further congressional goal of broad federal employment protection, and employer must prove that exemption applies by demonstrating that employee "fits plainly and unmistakably with the exemption's terms and spirit."); *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014) (FLSA liberally construed in favor of employee, exemptions narrowly construed against employers, and an employee will not be exempt except if found plainly and unmistakably within the terms and spirit of the exemption; *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1188 (10th Cir. 2015) (citing cases) (FLSA exemptions must be construed narrowly against employer, who must prove that employee is exempt by "clear and affirmative" evidence); *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1307 (11th Cir. 2009) (FLSA exemptions are narrowly construed, and to extend exemption to employee not plainly and unmistakably within its terms is abuse of interpretive process); *Cannon v. District of Columbia*, 717 F.3d 200, 204 (D.C. Cir. 2013) (employee entitled to overtime and minimum wage unless exempt, and exemptions are narrowly construed).

Accordingly, this Court can affirm the court of appeals ruling based solely on principles of statutory construction, and without recourse to DOL regulations.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

TERISA E. CHAW
Counsel of Record
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway
Suite 402
Oakland, CA 94612
(415) 296-7629
tchaw@nelahq.org

CATHERINE K. RUCKELSHAUS
NATIONAL EMPLOYMENT LAW PROJECT
75 Maiden Lane
Suite 60
New York, NY 10038
(212) 285-3025 x 306
cruckelshaus@nelp.org

JAMIE GOLDEN SYPULSKI
LAW OFFICE JAMIE GOLDEN SYPULSKI
150 North Michigan Avenue
Suite 1000
Chicago, IL 60601
(312) 332-6202
jsypulski@sbcglobal.net